In The Supreme Court Of The United Kingdom

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
OF ENGLAND AND WALES (CIVIL DIVISION)

C1/2009/0371
Neutral citation of judgment appealed against: [2009] EWCA Civ 1291

R
(on the application of ANDREW ADAMS)
Appellant

v

THE SECRETARY OF STATE FOR JUSTICE
Respondent

JUSTICE
Intervener

AND

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
IN NORTHERN IRELAND

Neutral citation of judgment appealed against: [2010] NICA 3

EAMONN MacDERMOTT

and

RAYMOND PIUS McCARTNEY
Appellants

v

THE SECRETARY OF STATE FOR NORTHERN IRELAND
Respondent

JUSTICE
Intervener

CASE FOR THE INTERVENER

INTRODUCTION

A

1. On 16 November 2010, JUSTICE was granted permission to intervene in these appeals and to make written submissions and oral submissions (limited to one hour).

2. JUSTICE was founded in 1957 as an independent human rights and law reform organisation. It is the UK section of the International Commission of Jurists.

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3. Between 1957, when JUSTICE was founded, and 1997, when the Criminal Cases Review Commission ('CCRC') was established, JUSTICE was the leading organisation concerned with correcting miscarriages of justice in the UK. Working with the BBC's *Rough Justice* and Channel Four's *Trial and Error* programmes, its work led to a significant number of convictions being set aside, and contributed to changes in law and practice in a number of areas, including the right to silence, the rules of evidence relating to identifications and confessions, and the need to safeguard against oppressive police questioning.

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4. JUSTICE seeks to assist the Court in respect of the core issue in this case, namely the correct interpretation of 'miscarriage of justice' in s.133 of the Criminal Justice Act 1988.

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5. The criminal justice system in the United Kingdom, to its credit, accepts its own fallibility. The Court of Appeal and the Criminal Cases Review Commission were set up following cases involving undoubted 'miscarriages of justice' – a phrase which has now entered everyday parlance. Following the abolition in 2006 of the *ex gratia* compensation scheme, s.133 is now the only means by which a person who has suffered a miscarriage of justice can obtain financial redress from the State. It is vital that the threshold for obtaining such compensation is not set unattainably high. It would be perverse, for example, if none of the notorious miscarriage of justice cases which led to the establishment of the CCRC would now qualify for compensation under s.133. And it would be startling if, for example, a different interpretation of miscarriage of justice under s.133 applied in Scotland than applies in England and Wales, and Northern Ireland.

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6. JUSTICE submits that restricting compensation under s.133 to cases where the applicant can demonstrate his innocence is unduly narrow, and does not provide adequate redress in cases where the criminal justice system has gone seriously wrong. The correct approach is that set out by Lord Bingham in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 at [4]. Where a conviction has been quashed out of time on the basis of a new or newly discovered fact, compensation should be paid where the applicant is (a) innocent, or (b) 'whether guilty or not, should clearly not have been convicted' or where 'something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.'

Authorities
Tab 6

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7. Since none of the criminal courts of appeal in question pronounced the Appellants in these appeals to be innocent, the Supreme Court must, as the core issue in this case, determine whether Lord Bingham's formulation is indeed correct – none of the Appellants meets Lord Steyn's formulation.[1]

8. The structure of JUSTICE's submissions[2] is as follows:

   A. The errors in the judgment of the Court of Appeal in *Adams*.
   B. The position in Scotland.
   C. The relevance of criminal appeal cases, legislation and Hansard to the interpretation of s.133.
   D. The Court of Appeal's approach in *Adams* results in an overly restrictive interpretation of s.133.
   E. The irrelevance of any other remedies for miscarriages of justice.
   F. The presumption of innocence.

A. THE ERRORS IN THE JUDGMENT OF THE COURT OF APPEAL IN *ADAMS*[3]

A1. The erroneous attempt to distinguish between 'unfair trial' and 'miscarriage of justice'

9. The Court of Appeal attempted to distinguish between the terms 'unfair trial' and 'miscarriage of justice'. JUSTICE submits that this attempt is unsuccessful. An examination of the Court's reasoning on this point demonstrates the close connection between the two terms, and indicates that 'miscarriage of justice' cannot require actual innocence.

Adams' App Pt. I pp. 3-26

Authorities Tab 76

10. The Court of Appeal rightly identified the fairness of the trial as an important factor in determining whether a case falls into Lord Bingham's category of cases where 'something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.' Dyson LJ (as he then was), giving the leading judgment, considered that, on the facts of the case, the Appellant had had a fair trial. However, he went on to say that 'even if the claimant was deprived of a fair trial, I do not consider that on the facts of this case there was a miscarriage of justice on an application of Lord

[1] Thus the first question posed for the Court in MacDermott's and McCartney's SFI is 'Does a miscarriage of justice occur for the purposes of section 133 of the Criminal Justice Act 1988 if a person is convicted by virtue of a trial process in which something went seriously wrong?', and the second question is 'Does a miscarriage of justice occur only if there is an acknowledgment that the person concerned was clearly innocent?'

[2] Each of JUSTICE's Issues A to F is directly relevant to Issues 9.2 and 9.3 in Adams' SFI; and to Issues 1-4 in MacDermott's and McCartney's SFI.

[3] References to the "the Court of Appeal in *Adams*" refer to the judgment of the Court of Appeal (Civil Division) on the compensation issue, not to the judgment of the Court of Appeal (Criminal Division) on Adam's appeal against conviction.

Bingham's interpretation.' ([61]; conclusion expressed in similar terms at [47]).

11. The Court of Appeal went on to accept that 'there may be cases where the acts or omissions of a defendant's legal representative which result in the quashing of a conviction are so egregious that a miscarriage of justice occurs within Lord Bingham's interpretation.' ([61]). In the Court of Appeal's view only a certain subset of unfair trial will amount to a miscarriage of justice. Even applying Lord Bingham's broader interpretation, by separating the concepts of unfair trial and miscarriage of justice the Court of Appeal severely restricted the category of successful applicants under s.133.

12. The Court of Appeal gave three examples of failures by legal representatives which would, in its view, meet this threshold: [61]. However, on analysis, each of those examples is highly likely to be inconsistent with the statutory pre-condition in s.133 that the miscarriage of justice must be first discovered at an out of time appeal:

    (1) '[W]here the legal representative fails to appear during part of the trial leaving the defendant to represent himself.' If this were to occur, the defendant would clearly be aware of it. He would undoubtedly raise it before the trial judge – if the judge himself had not already done so. It is wholly unrealistic to suppose that it would also go unnoticed at an in-time appeal. If the defendant had failed to raise it at an in-time appeal, and then attempted to raise it at an out of time appeal, he would be met with the insuperable objection that the legal representative's non-appearance was not a new or newly discovered fact: the defendant had been aware of it since the trial. Accordingly, it is difficult to see how such a case could ever give rise to a successful application under s.133.

    (2) '[W]here the legal representative fails to put the defence at all.' The failure of a legal representative to put any of the defence would undoubtedly be detected at trial, by both the defendant and the trial judge (especially given the now onerous defence case statement requirements). Moreover, if, for example, the advocate failed to put any of the defendant's defence to any of the witnesses, the judge would be required to prevent him from addressing the jury on that basis in his closing speech on. And if the defendant gave evidence but none of his exculpatory assertions had been put to the prosecution witnesses by his advocate, he would be cross-examined about that. The trial judge would tactfully enquire of the advocate why this had not been done. Since the defendant had not changed his instructions, the advocate would be obliged to seek to recall all the prosecution witnesses or, more likely, request that the jury be discharged. It is inconceivable that such a course of conduct would go un-noticed at trial or would not be raised at an in-time

appeal. This example is, therefore, equally inconsistent with the statutory pre-conditions in s.133.

(3) '[W]here the legal representative should have withdrawn from the case on account of a plain conflict of interest.' It is theoretically possible that this would only be discovered out of time. However, given that the defendant is likely also to have had an in-time appeal, for this matter only to be discovered out of time would require the defendant's legal representatives to have deliberately concealed this 'plain' conflict, not only at trial but also before the Court of Appeal. Such a course of action would amount to serious professional misconduct. It is difficult to conceive of such a conflict being unwittingly suppressed for such a period of time. Realistically, the example is not consistent with the statutory pre-conditions in s.133.

13. Although the paradigm examples given by the Court of Appeal are not stated to be exhaustive, since they are, on closer examination, inconsistent with the statutory pre-conditions in s.133, this indicates that the Court of Appeal adopted the wrong approach to the correct interpretation of 'miscarriage of justice' in s.133. The attempt to separate unfair trials from miscarriages of justice is also untenable in light of the caselaw of the Privy Council, considered below.

A2. The Privy Council's caselaw on the relationship between fairness and miscarriage of justice further demonstrates that the Court of Appeal in *Adams* adopted the wrong approach

14. The Court of Appeal appeared to consider that there was no necessary relationship between an unfair trial and a miscarriage of justice: a person may have been 'deprived of a fair trial', and this unfairness only remedied at an out of time appeal on the basis of a new or newly discovered fact, and still be denied compensation under s.133. It is submitted that this attempted distinction between an unfair trial and a miscarriage of justice is incorrect, and is inconsistent with the meaning of the term 'miscarriage of justice' in criminal appeals.

15. The Privy Council has consistently emphasised the close relationship between an unfair trial and a miscarriage of justice.

16. In *Boodram v The State* [2002] 1 Cr App R 12, the Privy Council considered a case where counsel at the appellant's retrial had been unaware of the previous trial. This had led to a number of significant points not being taken at the retrial. Giving the judgment of the Board, Lord Steyn at [39] indicated that 'Where counsel's conduct is called in question the general principle requires the court to focus on the impact of the faulty conduct.' However, Lord Steyn went on to cite with approval the analysis of de la Bastide CJ in *Bethel v The State* (2000) 59 WIR 451[4] (Court of Appeal of Trinidad and Tobago). In that case,

Authorities Tab 85

Authorities Tab 146

[4] The judgment of Lord Steyn gives the reference (1998) 55 WIR 394: this is in fact the reference to the judgment of the Privy Council, which remitted the case back to the Court of Appeal, in which de la Bastide subsequently gave the judgment cited by Lord Steyn.

de la Bastide CJ indicated that there may be cases where 'counsel's misconduct has become so extreme as to result in a denial of due process to his client.' [459] He went on to say that:

> 'In such a case, the question of the impact of counsel's conduct on the result of the case is no longer of any relevance, for whenever a person is convicted, without having enjoyed the benefit of due process, there is a miscarriage of justice regardless of his guilt or innocence. In such circumstances the conviction must be quashed. It is not difficult to give hypothetical examples of how such a situation might occur.' [459-460]

17. *Boodram* and *Bethel* indicate that, where a trial has been unfair, it is not then necessary to consider the impact which the matters which made the trial unfair may have had on the jury's verdict. An unfair trial necessarily implies a miscarriage of justice. In a case based on failures by legal representatives, there is no room for the conclusion that the failures were serious enough to deny the defendant a fair trial, but that he has not suffered a miscarriage of justice.

Authorities Tab 88

18. In *Muirhead v R* [2008] UKPC 40, another case involving failures by trial counsel, Lords Carswell and Mance cited *Boodram* in their concurring opinion and emphasised at [35] that 'The focus of the court should be on the effect of the failure on the fairness of the trial, rather than the extent or degree of the error on the part of counsel.' Lord Hoffmann, giving the judgment of the Board, allowed the appeal because, despite the scant information about the two relevant trial counsel failures, there was 'too great a risk that the Appellant did not have a fair trial.' ([31]) To similar effect, in *Barlow v The Queen* [2008] UKPC 32, Lords Scott and Rodger indicated in their judgment at [58] that 'there can be no question of the Board applying the [miscarriage of justice] proviso if what went wrong at the trial made the trial unfair.' (emphasis added)

Authorities Tab 90

19. Accordingly, it is well established that, when applying the term 'miscarriage of justice' in the context of criminal appeals, the fairness of the trial is highly material. An unfair trial necessarily amounts to a miscarriage of justice.

B. THE POSITION IN SCOTLAND[5]

20. The position in Scotland is highly relevant because:
    a. It provides further support for the proposition that an unfair trial is a miscarriage of justice.
    b. Section 133 applies in Scotland[6] and innocence is not the sole criterion.

[5] See also Printed Case of MacDermott and McCartney at [85]-[91].

[6] Section 172, the extent provision, includes s.133 on the list of provisions applying to Scotland.

c. Section 133 only applies where a retrial is not ordered. This is unaffected by the existence of the 'not proven' verdict.
d. It was not considered in *Mullen*.

B1. Unfairness necessarily implies a miscarriage of justice

21. The link between unfairness and miscarriage of justice is emphatically restated in a recent Privy Council decision on an appeal from Scotland. In *McInnes v Her Majesty's Advocate* [2010] UKSC 7, a case involving non-disclosure of relevant prosecution witness statements, the Board considered the relationship between the two concepts. Considering the threshold for allowing an appeal in a non-disclosure case, Lord Hope stated that: Authorities Tab 91

> 'The threshold which must be crossed is the same as that which applies in any case where it is maintained that, because there was a violation of article 6(1) that affected the way the trial was conducted, there has been a miscarriage of justice. I also agree that, in a case of that kind, the question whether there has been a miscarriage of justice and the question whether the trial was unfair run together. It is axiomatic that the accused will have suffered a miscarriage of justice if his trial was unfair. The statutory ground for setting aside the jury's verdict under s106(3) of the 1995 Act[7] enables the appeal court to provide an effective remedy to the Appellant for the breach of his Convention right. This is done when the appeal court makes its own assessment as to whether the trial as a whole was fair. It will allow the appeal on the ground that there was a miscarriage of justice if it concludes that it was not.' [23] (emphasis added) Authorities Tab 21

22. Lord Walker specifically endorsed Lord Hope's view at [34].

23. The sole test for criminal appeals in Scotland is 'miscarriage of justice', which is defined in s.106(3) of the Criminal Procedure (Scotland) Act 1995 as including 'the existence and significance of evidence which was not heard at the original proceedings', and 'the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.' The latter is plainly wider than innocence. Miscarriage of justice has been given a broad meaning in Scottish criminal appeals: see for example *Harper v Her Majesty's Advocate* [2005] SCCR 245, where the High Court (Lord Justice Clerk, Lord Osborne and Lord Macfadyen) indicated that: Authorities Tab 21 Authorities Tab 65

> 'The statutory provisions do not, of course, elaborate what may constitute a miscarriage of justice, except in so far as subsection (3)(a) and (b) furnishes examples of what may constitute a

[7] The Criminal Procedure (Scotland) Act 1995, s.106(3) of which sets out the test for criminal appeals in Scotland. It provides that 'By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on (a) subject to subsections 3A to 3D below, the existence and significance of evidence which was not heard at the original proceedings; and (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.' Authorities Tab 21

> miscarriage. No doubt, it would be difficult or impossible and unwise to attempt a comprehensive definition of the concept of miscarriage of justice; it is sufficient to say that it may cover a wide variety of situations in which, for one reason or another, the court concludes that justice has not been done, in the particular circumstances of a case. However, having said that, it has never been recognised by the court that some general concern, or unease, in relation to a particular conviction, with no further specification, could be a basis upon which a conviction could be disturbed.' [33][8] (emphasis added)

24. The relationship between fair trial and miscarriage of justice, in the context of failures by the defendant's legal team, was considered in detail by Lord Justice General Hope (as he then was) in *Anderson v Her Majesty's Advocate* [1996] SCCR 14. He emphasised the connection between competent legal representation and the right to a fair trial: that right

Authorities Tab 44

> 'includes the right to have his defence presented to the court. Whether he is represented by counsel, by a solicitor-advocate or by a solicitor, his right is to representation in such a way that his defence will be presented to the court. This is in order that he may receive a fair trial on the charge which has been brought against him.' [43]

25. Lord Hope JG considered that there is:

> 'a tension between the principles which give a wide discretion to counsel to conduct the defence as he thinks fit and the duty of a court of criminal appeal to correct a miscarriage of justice on the ground that the accused did not have a fair trial. On the one hand the accused cannot be deprived of his right to a fair trial. If he is deprived of that right, there will be a miscarriage of justice in the proceedings … which must be corrected by the appeal court. On the other hand the principles which affect the position of counsel are fundamental to the administration of justice in this country. Counsel's independence must be preserved if he is to fulfil his duty to the court and to act in the act in the public interest on his professional responsibility. Any erosion of this principle would be bound to lead to uncertainty, and with it to the risk of delay and confusion in the conduct of criminal trials, which rely to a substantial extent for their fairness and efficiency on the right of counsel to exercise their own judgment as to the way in which the defence is conducted. Accordingly it cannot be asserted as an absolute rule that the conduct of the defence by the accused's counsel or solicitor will not be a ground of appeal. But the circumstances in which it will provide

Authorities Tab 66

[8] See also *James (Cliffroy) v Her Majesty's Advocate* [2006] SCCR 170, where the High Court (Lord Justice Clerk, Lord Osborne, Lord MacLean) quashed the appellant's conviction on the basis that there had been a miscarriage of justice within the meaning of s.106(3) where he had been deprived of a fair trial by reason of (a) a serious conflict of interest on the part of his legal representatives; (b) serious mistakes made by his legal representatives in the conduct of the trial.

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> a ground of appeal must be defined narrowly. The conduct must be such as to result in a miscarriage of justice, otherwise section 228(2) of the 1975 Act[9] will not apply. It can only be said to have resulted in a miscarriage of justice if it has deprived the accused of his right to a fair trial.' (131C-132A, emphasis added)

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26. This express assimilation of unfair trial and miscarriage of justice was accepted as uncontroversial by the Privy Council in *McInnes*. Their Lordships' Board did not qualify the equation between unfair trial and miscarriage of justice by particular reference to the Scottish statutory background.

Authorities Tab 91

B2. Section 133 applies to Scotland and innocence is not the sole criterion

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27. The Scottish caselaw on miscarriage of justice is of particular assistance because s.133 applies to Scotland, where the compensation scheme is administered by the Scottish Ministers. It is striking that the Ministers' published guidance on s.133 makes no reference to actual innocence:

Authorities Tab 3

Authorities Tab 177

> 'In any case referred to the Appeal Court by the SCCRC [Scottish Criminal Cases Review Commission], where the conviction has subsequently been quashed and not upheld in any subsequent retrial, the successful appellant will normally be eligible for the payment of compensation (provided a claim is made) and further consideration will not normally be required, unless:
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> - the grounds for allowing the appeal were due to an error by the trial judge alone and not due to any new facts, or
> - acquittal was on a point of law following a referral by the SCCRC, or
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> E
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> - the delay in appearance of the new facts was wholly or partly attributable to the convicted person.
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> […]
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> There is a general right to compensation where there has been a late reversal of a conviction (or pardon) on the grounds of a new or newly discovered fact.' (emphasis added)

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28. Factual innocence only arises for consideration in Scotland under the *ex gratia* scheme, which continues to exist following its abolition in England and Wales. The relevant guidance by the Scottish Ministers indicates that:

> 'If serious default is not alleged or established, consideration will be given to whether the applicant has been completely exonerated. The complete exoneration of the applicant would be
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> a significant factor that would point towards the existence of exceptional circumstances. Complete exoneration will arise

[9] The Criminal Procedure (Scotland) Act 1975, the predecessor to the 1995 Act.

where it can conclusively be established that the accused person did not commit the crime.'

29. JUSTICE submits that the 'general right to compensation where there has been a late reversal of a conviction (or pardon) on the grounds of a new or newly discovered fact', as applied by the Scottish Ministers without reference to guilt or innocence, flows from the fact that:
    (a) 'miscarriage of justice' is the test for Scottish criminal appeals, as well as under s.133;
    (b) the Scottish Ministers rightly consider that there is no distinction between the term as used in the two different statutes; and
    (c) the Scottish Ministers correctly recognise that innocence should not be the sole criterion in determining 'miscarriage of justice' under s.133.

B3. Section 133 only applies where no re-trial is ordered

30. The 'general right to compensation' to which the Ministers refer, in cases where a conviction has been reversed out of time on the basis of a new or newly discovered fact, does not of course mean that all successful out of time fresh evidence appeals will lead to an award of compensation. Where an appellate court, in Scotland (or in England), considers that the fresh evidence simply *may* have led to a different result (what has been termed a Category 3 case, in the caselaw on s.133), the usual course will be to order a retrial.[10] Such a case will not fall within the scope of s.133. The power to order a retrial in cases where there is still, despite the fresh evidence, a case against the defendant which ought to be considered by a jury, is an important filter which operates to prevent the payment of compensation in all successful out of time fresh evidence appeals. However, where the Court of Appeal decision amounts to a final 'reversal' of the conviction – in other words, where there is no retrial – then the position in Scotland is that s.133 provides for a 'general right to compensation.' Such an interpretation is workable and, it is submitted, should apply equally to England & Wales and Northern Ireland.

McCartney's App pp. 5-11

Authorities Tab 79

31. As Morgan LCJ noted in *MacDermott and McCartney's Application* [2010] NICA 3, it is essential for the various UK jurisdictions to apply s.133 consistently:

> 'The interpretation of section 133 is a matter in respect of which the approach of the two jurisdictions in Northern Ireland and in England and Wales ought to be identical, involving as it does the interpretation of a common statutory provision applying an international obligation.' [31]

32. Since the United Kingdom as a single State party ratified Article 14(6) of the ICCPR, there can be no room for differing interpretations of the

[10] See Printed Case of Adams at [2.4]-[2.5] for an analysis of the factors relevant to a decision to order a retrial.

international obligations imposed on the different territories within that State. From the perspective of international law, the United Kingdom is a single entity. It had one vote in the adoption of Article 14(6), by which it could not have intended two different results. Further, it must comply with Article 14(6) throughout its territory. As Professor Lowe states,[11] when considering Article 2 of the 1933 Montevideo Convention on the Rights and Duties of States[12], Authorities Tab 161

> 'The conduct of foreign relations is a function of the federal government, not of provincial or state governments. If the Government of Scotland or of Texas were to violate some rule of international law, for example by imposing laws requiring unlawful discrimination, it would be the United Kingdom or the United States that would be responsible…'

33. The power to order a retrial and the 'general right to compensation' in Scotland are not affected by the existence of the 'not proven' verdict in Scotland. Although it might be argued that the special verdict encompassed the situation in which an acquitted defendant has not been completely exonerated, the Scottish Appeal Court does not in fact utilise the verdict when allowing appeals.

34. In this respect, it is submitted that the Northern Ireland Court of Appeal fell into error in *MacDermott and McCartney's Application* when it considered that all category 3 cases were necessarily outside the test as formulated by Lord Bingham (and that the fourth certified question in those cases should therefore be answered in the negative). JUSTICE submits that that narrow category of cases – successful out of time appeals/CCRC referrals based on new or newly discovered facts in which a retrial is not ordered – do indeed fall within the test as formulated by Lord Bingham.[13] McCartney's App pp. 5-11 Authorities Tab 79

35. The above conclusion is re-enforced by the outcome of the case of *O'Brien and others v Independent Assessor* [2007] 2 AC 312. The appellants were the 'Bridgewater Four' who had been convicted in 1979 of the murder of the teenage newspaper boy Carl Bridgewater. Their appeals were allowed by the Court of Appeal in *R v Hickey and others* (30 July 1997; Roch LJ, Hidden and Mitchell JJ), after they had spent 19 years in custody. The Court of Appeal when allowing their appeals said, as regards Vincent Hickey: "[i]n the light of Vincent Hickey's confessions to presence at Yew Tree Farm [where the murder occurred] on the material afternoon we consider that there remains evidence on which a reasonable jury properly directed could convict." (p18 of transcript). But the Court did not order a retrial. Vincent Hickey's subsequent application for compensation under s.133 was allowed (the appeal to the House of Lords related to Authorities Tab 68 Authorities Tab 45

[11] *International Law* (Oxford, 2007), p.157. Authorities Tab 161

[12] 'The federal state shall constitute a sole person in the eyes of international law'. In respect of the Montevideo Convention, Professor Lowe notes that, 'while its four criteria have been added to, no-one has suggested that any of them is dispensable.' (p.153)

[13] See further Printed Case of McDermott and McCartney at [44]-[47]: such category 3 cases are subsumed within category 4.

quantum only). The case demonstrates, therefore, that a category 3 case in which no retrial is ordered and which meets the statutory pre-conditions in s.133 does indeed fall within Lord Bingham's formulation.[14]

C. THE RELEVANCE OF CRIMINAL APPEAL CASES, LEGISLATION AND HANSARD TO THE INTERPRETATION OF S.133

C1. The ICCPR *travaux* are neutral on the meaning of 'miscarriage of justice'; domestic law and practice should therefore inform the content of the term[15]

Authorities Tab 57

36. The cases considered above deal with the term 'miscarriage of justice' as used in criminal appeal statutes. At first instance in *Mullen v Secretary of State for the Home Department* [2002] 1 WLR 1857 at [26], Simon Brown LJ (as he then was) sought to distinguish between the meaning of the term when used in criminal appeals, and when used in s.133. Simon Brown LJ did not refer to any authority for this distinction. When departing in the House of Lords from Simon Brown LJ's decision as to the meaning of 'miscarriage of justice', Lord Bingham did not indicate whether or not he considered Simon Brown LJ's distinction between 'miscarriage of justice' in criminal appeal statutes and in s.133 to be well founded.

Authorities Tab 6

37. As Lord Bingham (at [9(2)]) and Lord Steyn (at [54]) noted in *Mullen*, the *travaux préparatoires* relating to the adoption of Article 14(6) are neutral on this issue. Nothing in the Covenant itself, or in the *travaux*, demonstrates a consensus among the States Parties to the ICCPR that compensation should be paid only to the innocent. As Lord Bingham noted,

> 'every proposal to that effect was voted down. The *travaux* disclose no consensus of opinion on the meaning to be given to this expression. It may be that the expression commended itself because of the latitude in interpretation which it offered.' [9(2)].

38. The meaning of 'miscarriage of justice' was apparently left open to the individual interpretation of States, against a background of a wide spectrum of opinion as to whether compensation should be restricted to cases of actual innocence. Although s.133 must be interpreted on the basis that it embodies the terms of an international agreement, the international community did not agree on what the words should mean. Regarding State practice, the International Court of Justice has

Authorities Tab 47

[14] The case of *R v McNamee* (Unreported, 17 December 1998 (CA)) is a further example of a category 3 case with no retrial, in which compensation was paid under s.133. The appellant had been convicted in 1987 of the 1982 Hyde Park bombing. Quashing his conviction in 1998, the Court of Appeal stated that 'the impact of the fresh evidence on the case is not conclusive, but it is such as to render the verdict of the jury unsafe because a reasonable tribunal of fact might properly resolve the conflict in favour of the Appellant, and so be left with a reasonable doubt as to his guilt.' (Transcript p.22, per Swinton Thomas LJ).

[15] See also Printed Case of McDermott and McCartney at [66].

indicated that such practice must be consistent among the member states, must demonstrate a particular understanding of the text of the treaty, and must lead to 'an inference, and one inference only, as to their common intention and understanding at the time they entered into the treaty as to the meaning of the text.': *Certain Expenses of the United Nations*, [1962] ICJ Reports 150, 191 (Sir Percy Spender). JUSTICE was unable to find comparative material which met the consistency requirements[16] of the *United Nations* case. JUSTICE has therefore not sought to adduce any such material.

Authorities Tab 133

39. Accordingly, in light of the wide variation in State practice and the neutral *travaux*, it is submitted that the domestic courts should give the term the meaning which best accords with domestic law and practice. For that reason, JUSTICE submits that the meaning of the term in the criminal appeal context is most relevant to the interpretation of s.133.

C2. The Home Secretary is bound by Court of Appeal's view of whether a 'miscarriage of justice' has occurred, and the Court of Appeal itself cannot determine innocence. The Home Secretary did not state innocence to be the sole criterion for s.133

40. The ICCPR *travaux* indicate that States, and therefore Parliament, were given a wide latitude as to the meaning to be ascribed to 'miscarriage of justice'. When enacting s.133, Parliament was simply incorporating Article 14(6): the Parliamentary debates make it clear that Parliament (in relation to the core issue of the meaning of 'miscarriage of justice') did not intend, in passing s.133, to go further than that which was required by Article 14(6).[17] But Parliament was free to interpret the obligation under Article 14(6) expansively, and to give it a meaning going beyond mere factual innocence. That is precisely what it did. The only respect in which Parliament did choose to go further than the obligation imposed by Article 14(6), was by the use of 'beyond reasonable doubt' in s.133, rather than 'conclusively' in Article 14(6).

Authorities Tab 12

41. Parliament did not use the word 'innocent' in s.133. JUSTICE submits that is because it did not intend 'miscarriage of justice' to be synonymous with innocence. The starting point for this analysis is an answer by the relevant Minister during the Parliamentary passage of what became s.133 in 1988. Lord Hutchinson of Lullington asked Earl

Authorities Tab 10

[16] c.f. Printed Case of Adams at [4.57].

[17] In 1988 Parliament wanted to codify and formalise the obligation to give effect to Article 14(6) ICCPR that was previously being discharged exclusively by the *ex gratia* statement of the Home Secretary, Roy Jenkins (Hansard (HC Debates), 29 July 1976, cols 328-330). Earl Ferrers, the Minister of State at the Home Office, indicated that 'we should use the opportunity which is presented to give statutory effect to the United Kingdom's obligations under Article 14, paragraph 6, of the International Covenant on Civil and Political Rights. Your Lordships will know that we already meet those obligations in practice. However, successive governments have acknowledged that legislation would be necessary to meet the letter as well as the spirit of the covenant.' (Hansard (HL Debates), 22 July 1988, col 1620). c.f. Printed Case of Adams at [2.11].

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Authorities Tab 10

Ferrers, the Minister of State at the Home Office, about the meaning of 'miscarriage of justice'[18]: A

Authorities Tab 10

> 'I should like to put a question to the noble Earl on this matter of miscarriage of justice which is of some importance.
> […]
> When a new fact goes to the Court of Appeal it is considered and if it arouses a lurking doubt as to the satisfactory nature of the conviction it allows the appeal. If the Home Office looks at the matter it has to be satisfied of the person's innocence before a pardon can be advised. Therefore, there are two different views on what amounts to a miscarriage of justice. B
> It is a crucial point. Let us suppose a new fact arises. It is brought to the attention of the Secretary of State and considered by him. The Secretary of State says to himself, "Well, if that fact had been available on appeal there is no question in my mind but that the Court of Appeal would have had a lurking doubt and would have quashed the conviction." It means that there is a miscarriage of justice because the person was convicted on inadequate evidence. C
> Alternatively, the Secretary of State may look at the case and say, "The Court of Appeal might have done that but I am not satisfied that this person is innocent and therefore there has not been a miscarriage of justice." Those are two very different approaches and it seems to me essential that if compensation depends on the establishment of a miscarriage of justice, it should be absolutely clear what view the Secretary of State takes as to what amounts to such a miscarriage.' [House of Lords Hansard, 22 July 1988, col 1632, emphasis added]. D

42. Earl Ferrers replied as follows:

Authorities Tab 10

> 'The noble Lord, Lord Hutchinson, asked a specific question. The normal course is to refer cases to the Court of Appeal and to regard its view as binding. The Home Secretary has a residual discretion which he can apply where the new matters are ones that could not be considered by the Court of Appeal.' [col 1634, emphasis added] E

43. It is important to consider what the Minister meant by saying that the normal course was for the Secretary of State, when considering an application under s.133, to regard the Court of Appeal's view as 'binding'. In making that statement, the Minister was specifically disavowing one possibility put forward by Lord Hutchinson: that the Secretary of State would retain a discretion to decide that, notwithstanding the quashing of a conviction by the Court of Appeal, the Secretary of State himself was not satisfied of the applicant's innocence. The intention to be 'bound' by the decision of the Court of Appeal indicates that the Secretary of State did not consider that he was entitled to exercise his discretion to pick and choose between F G

[18] cited by Lord Bingham in *Mullen* at [9].

convictions quashed by the Court of Appeal, compensating only the applicants whom he himself considered to be actually innocent.

44. In 1988, the Court of Appeal determined criminal appeals by reference to the un-amended s.2(1) of the Criminal Appeal Act 1968, which provided that the Court of Appeal should allow an appeal against conviction where it considered:

Authorities Tab 1

(a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
(b) that the judgment of the court of trial should be set aside on the ground of a wrong decision on any question of law; or
(c) that there was a material irregularity in the course of the trial.

45. Section 2(1) went on to set out the proviso:

> 'Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.' [Emphasis added]

46. 'Miscarriage of justice', therefore, lay at the heart of the Court of Appeal's consideration in deciding whether or not to allow an appeal.

47. But when the Minister indicated that the Secretary of State would treat the view of the Court of Appeal as 'binding', the Court was then applying a 'miscarriage of justice' test which has never been considered to be congruent with actual innocence.

48. This is illustrated by the Privy Council cases considered above, and is well-established in the English caselaw. In the Birmingham Six case, *R v McIlkenny and others* [1992] 2 All ER 417; (1991) 93 Cr App R 287, the Court of Appeal (Lloyd, Mustill and Farquharson LJJ) stated that:

Authorities Tab 36

> 'Since the present appeal has given rise to much public discussion as to the powers and duties of the Court of Appeal, Criminal Division, and since the Home Secretary has set up a Royal Commission to investigate and report, it may be helpful if we set out our understanding of the present state of the law.'
>
> …
>
> 'Nothing in s.2 of the 1968 Act or anywhere else obliges **or entitles us** to say whether we think that the appellant is innocent. This is a point of great constitutional importance. The task of deciding whether a man is guilty falls on the jury. We are concerned solely with the question whether the verdict of the jury can stand.' (424-5) [emphasis added][19]

[19] See also Printed Case of MacDermott and McCartney at [79].

49. In that case, the Court was applying s.2 of the 1968 Act before its amendment in 1995, so the 'miscarriage of justice' proviso remained in force. However, the existence of the proviso did not affect the Court's conclusion that innocence was irrelevant to its task. If the Government had indeed taken the view that innocence was the threshold requirement for compensation under s.133 – an option clearly stated by Lord Hutchinson in his question – then the Minister would not have stated that the Secretary of State intended to be bound by the Court of Appeal, given the Court's view[20] that it could not determine innocence.

50. The Court of Appeal's clear statement that it cannot determine innocence is unaffected by the subsequent amendments to s.2 of the 1968 Act (considered below). When Lord Bingham in *Mullen* at [9(6)] stated that courts of appeal "are not called upon to decide whether a defendant is innocent and in practice very rarely do so", in fact, having regard to *McIlkenny* (which was not cited in *Mullen*), he understated the position – the appeal court is 'not entitled' to do so.

Authorities Tab 6

Authorities Tab 36

C3. The redundancy of 'miscarriage of justice' in the un-amended s.2 of the 1968 Act indicates that it is not congruent with innocence

51. The Court in *McIlkenny* referred to the Royal Commission on Criminal Justice, chaired by Lord Runciman, which was at that time considering the powers of the Court of Appeal. In its subsequent report,[21] the Commission considered the proviso, and took the view that it was logically redundant within the structure of s.2 as it then stood:

> 'It can hardly be applied if a conviction is unsafe. But if no miscarriage of justice has occurred, the proviso is unnecessary, since the conviction need not then be regarded as unsafe. When an error of law has occurred, the court can decide whether or not it is so serious that the conviction "should be set aside" without the existence of the proviso. Similarly, in paragraph (c), it has been argued that the words "material irregularity" make the proviso equally unnecessary, since if the irregularity is not material, that should be sufficient grounds for allowing it.' [p.168, para.31]

Authorities Tab 166

52. This further underlines the fact that the Court of Appeal, under the old s.2, was not concerned with innocence. The Royal Commission took the view that where, for example, there had been a 'material irregularity' in the trial, there would be no basis for applying the proviso. 'Material irregularity' is plainly wider than innocence.

[20] Although *McIlkenny* was decided after the Minister made his statement in Parliament, there was no suggestion in *McIlkenny* that the law was any different in 1991 than it was in 1988.

[21] *The Royal Commission on Criminal Justice: Report* (Cm 2263), July 1993.

53. The redundancy of the proviso in the old s.2 was also recognised by the Home Secretary, Lord Chancellor and Attorney General in their consultation paper *Quashing Convictions*[22]. They noted that 'by the time Parliament deleted the proviso in what was to become the Criminal Appeal Act 1995, most commentators considered that the proviso, as then worded, added nothing of significant value to the test itself.' [34]

Authorities Tab 173

C4. If 'miscarriage of justice' in s.133 CJA 1988 and s.2 CAA 1968 have different meanings, then only the Secretary of State can determine innocence.

Authorities Tab 3

Authorities Tab 2

54. If 'miscarriage of justice' in s.133 were to be given a wholly different meaning to that applied by the Court of Appeal, then there would be no basis on which the Court of Appeal's view on that (irrelevant) 'miscarriage of justice' question could meaningfully bind the Minister when applying s.133. The only way in which innocence could be required under s.133, while also allowing the Secretary of State to treat the Court of Appeal's view as binding as he indicated to Parliament, would be if compensation were only to be payable in cases where the Court of Appeal went beyond its statutory remit and pronounced on the innocence of the appellant. This possibility found favour with Lord Steyn in *Mullen*. Under the heading 'A workable solution', Lord Steyn observed that:

Authorities Tab 6

> 'The circumstances may justify the conclusion beyond reasonable doubt that the defendant had been innocent. Sometimes the Court of Appeal makes it clear (see *R v Fergus* (1994) 98 Cr App R 313, 325) and sometimes it can be inferred from the circumstances. The interpretation which I have adopted is therefore perfectly workable.' [55]

Authorities Tab 41

55. This suggestion fundamentally conflicts with *McIlkenny* (which was not cited in *Mullen*), in which the Court of Appeal emphasised that it is not entitled to pronounce on guilt or innocence. As will be considered below, in none of the notorious miscarriage of justice cases of the early 1990s did the Court pronounce the appellants 'innocent': not because it necessarily thought otherwise, but because it is no legitimate part of its function to do so. If Lord Steyn's 'workable solution' is correct then compensation will be confined to those subset of cases where the Court of Appeal wrongly oversteps its statutory function and chooses to pronounce on an appellant's innocence.

Authorities Tab 36

[22] Office for Criminal Justice Reform, *Quashing Convictions – Report of a Review by the Home Secretary, Lord Chancellor and Attorney General*, September 2006. The Review was announced by Charles Clarke, then Home Secretary, in the Written Ministerial Statement in which he abolished the *ex gratia* compensation scheme (Written Ministerial Statement, 19 April 2006). He stated that 'I have embarked on an urgent review, with the Lord Chancellor and Attorney General, of the statutory test the Court of Appeal must use in deciding whether to quash a conviction. I propose to examine whether and if so to what extent an error in the trial process necessarily means a miscarriage of justice.'

Authorities Tab 173

56. Such cases are (a) extremely rare, and (b) form an entirely arbitrary and improper way of establishing innocence, even if that were to be the test. Even if actual innocence were the test, this is not a rational means of establishing which appellants are actually innocent. It is bound to catch only a very small subset of the innocent. **A**

57. It is submitted that, if innocence were the criterion under s.133, the Court of Appeal is not in a position to make that determination, and Lord Steyn's 'workable solution' does not in fact supply a rational and fair means of establishing innocence. The alternative is for the Secretary of State to decide the matter herself. However, such a suggestion faces two insurmountable problems. **B**

58. Firstly, the Secretary of State is manifestly ill-suited for this task. The serious difficulties faced by the Home Office in reviewing criminal convictions in potential miscarriage of justice cases were outlined by JUSTICE in its 1968 report *Home Office Reviews of Criminal Convictions*, were recognised in 1993 by the Runciman Commission, and led to the establishment of the CCRC as a body better equipped, by reason of its independence and expertise, to carry out that fact-finding function. **C**

59. Secondly, the Minister has indicated to Parliament that the Secretary of State will be bound by the Court's of Appeal's determination in this regard i.e. that he cannot himself make the determination. JUSTICE submits that the Hansard extract set out above is therefore admissible on the basis set out by Lord Hope in *R v A (No 2)* [2002] 1 AC 45: **D**

Authorities Tab 56

> 'this exercise is available for the purpose only of preventing the executive from placing a different meaning on words used in legislation from that which they attributed to those words when promoting the legislation in Parliament.' [81] (See also *Wilson v First Country Trust Ltd (No 2)* [2004] 1 AC 816, [113]).

Authorities Tab 62 **E**

60. In light of the Minister's acceptance in Parliament that 'miscarriage of justice' means what the Court of Appeal considers it to mean, the Secretary of State cannot now argue that compensation is payable only to the innocent (since that is not what the Court of Appeal determines), or that she herself will form a view on innocence independent of the determination of the Court of Appeal (since he has said the contrary to Parliament). **F**

61. In this context, JUSTICE notes that a previous Home Secretary, Kenneth Baker, also acknowledged that it is not for him to decide on innocence. When awarding compensation to the Birmingham Six, he stated that:

Authorities Tab 95

> 'it is not for me to determine guilt or innocence, but those men were wrongly imprisoned. They should not have been convicted on the evidence that was presented to the court and will receive compensation for that.'[23] **G**

[23] Hansard, HC Deb 14 March 1991, vol. 187 col. 1121.

C5. No indication when amending s.133 that 'miscarriage of justice' was congruent with innocence

62. In this regard, it is also notable that there was no suggestion made in Parliament by the relevant Ministers, when amending s.133 in 1995 (by the Criminal Appeal Act 1995) and in 2008 (by the Criminal Justice and Immigration Act 2008), that compensation was payable only to the innocent. This is so, even though the 1995 amendments included the insertion of subsection 4A(c), which provides that the applicant's previous convictions are relevant to the issue of quantum – an issue which is wholly unconnected with innocence. And sub-section 4A(b) also mandates the assessor to have regard to 'the conduct of the investigation and prosecution of the offence' – a factor which is also irrelevant to innocence but is relevant to Lord Bingham's wider formulation of 'miscarriage of justice'. Furthermore, the 1995 Act also amended s.2 of the Criminal Appeal Act 1968 so as to make 'unsafe' the sole test for appeals against conviction. In other words, at precisely the time at which Parliament removed 'miscarriage of justice' as a factor for the Court of Appeal's express consideration (and assimilated it to 'safety') it felt the need to provide additional clarification of types of miscarriage, but still did not mention innocence as being the exclusive criterion.

63. It is remarkable, if actual innocence is and always has been the sole criterion, that it is not mentioned in s.133 (as amended) and that innocence has never been mentioned in Parliament – when the question was asked directly of Earl Ferrers in 1988 or at any subsequent time during the legislative amendments to s.133. Earl Ferrers' undertaking can only be sensibly interpreted as meaning that innocence is not the threshold requirement: otherwise there would be no logic in the Secretary of State binding himself to the decisions of a body which was not addressing the test which he considered relevant.

D. THE COURT OF APPEAL'S APPROACH IN *ADAMS* RESULTS IN AN OVERLY RESTRICTIVE INTERPRETATION OF S.133

D1. The threshold for obtaining compensation under s.133 must be attainable

64. JUSTICE submits that confining s.133 to cases where the applicant can demonstrate his innocence of the offence would restrict the statutory compensation scheme to such a narrow class of cases that it would not be an effective safeguard against serious failures in the criminal justice system. If the Court of Appeal in *Adams* was correct, then even a defendant who has not had a fair trial, and who satisfies the other requirements of s.133, may nevertheless not qualify for compensation. The Court of Appeal's decision that not all unfair trials qualify for compensation will leave defendants who have been imprisoned, perhaps for many years, as a result of an unfair trial (itself a breach of Article 14(1) of the ICCPR) without compensation. Not

Authorities Tab 76

only is this not the intention of Article 14(6), but there is the real risk that such a result would deprive defendants of an effective remedy for the breach of Article 14(1), as required by Article 2(3) of the Covenant. c.f. *Dumont v Canada* (Comm No 1467/2006, 16 March 2010) in which the UN Human Rights Committee found a violation of Article 2(3) taken in conjunction with Article 14(6) of the Covenant because the threshold for establishing a miscarriage of justice was unattainably high.[24]

Authorities Tab 104

65. JUSTICE submits that the proper approach to Article 14(6) is that taken by Lord Bingham in *Mullen*. In practice, adopting Lord Bingham's definition is unlikely to lead to large numbers of successful claims: the post-*Mullen* decisions of the lower courts have found that, even applying Lord Bingham's test, the facts do not meet it.[25] As Professor JR Spencer expressed it in a recent article,[26]

Authorities Tab 157

> 'Thus like the Fen Tiger and the Abominable Snowman, the "miscarriage of justice" that meets Lord Bingham's wider test whilst failing Lord Steyn's stricter one might theoretically exist, but no actual specimen has yet been found.' (810-811)

66. In practice, therefore, the application of Lord Bingham's test has resulted in a very modest expansion of the category eligible for compensation, beyond the tiny category of those who have been said by the Court of Appeal to be innocent.

67. The consequences of restricting s.133 to cases of actual innocence are particularly stark in light of the abolition in England and Wales of the *ex gratia* scheme, which was able to provide compensation in a wider range of cases, although at the discretion of the Secretary of State. It also leads to an anomalous position as between Scotland and England and Wales. As noted above, in Scotland 'complete exoneration' is a matter which is only considered to be relevant to the *ex gratia* scheme, and even then, only in cases where the applicant cannot demonstrate 'serious default'. By contrast, if Lord Steyn's view in *Mullen* were to prevail in England and Wales, then 'complete exoneration' or factual innocence would be the threshold requirement for s.133, despite the fact that s.133 applies in both jurisdictions, and despite the requirement of consistency within the United Kingdom as to the application of s.133.

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[24] See further Printed Case of McDermott and McCartney at [92]-[96]. The HRC caselaw to date on Article 14(6) is summarised in *Dumont* at fn12 to [23.2].

[25] *R (Murphy) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin): conviction not reversed 'on the ground of' a 'new or newly discovered fact', so unnecessary to decide whether Lord Bingham or Lord Steyn correct, since case would fail either test; *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin); *R (Allen, formerly Harris) v Secretary of State for Justice* [2008] EWCA Civ 808 (in which the Court preferred the judgment of Lord Steyn to that of Lord Bingham); *R (Siddall) v Secretary of State for Justice* [2009] EWHC 482 (Admin): facts of the cases did not fall into either Lord Bingham or Lord Steyn's definition.

Authorities Tabs 64, 7, 9 & 73

[26] JR Spencer QC, 'Compensation for Wrongful Imprisonment', [2010] Crim LR 803.

Authorities Tab 157

68. This high threshold is compounded by (a) the 'new or newly discovered fact' requirement,[27] and (b) the fact that applications can only be made where a conviction is reversed at an out of time appeal. JUSTICE notes, firstly, that the inclusion of those two additional criteria, which are irrelevant to innocence, would not sit comfortably as part of a statutory scheme which is aimed at compensating innocent victims of wrongful convictions. Further, taken together with these two further requirements, setting the threshold at 'factual innocence' ensures that almost nobody will qualify for compensation, even where serious default leading to an unfair trial is discovered out of time on the basis of fresh evidence. JUSTICE is not aware of any reported case of any applicant meeting this threshold, even though the courts since *Mullen* (for example the Court of Appeal in *Adams*) have often applied both the tests of Lord Bingham and Lord Steyn, thereby avoiding having to decide which was in fact correct.[28] Moreover, given that innocence is not the test which the Court of Appeal applies when considering convictions, it is certainly not surprising that there is apparently no reported case in which the courts have held that an applicant should be awarded compensation under s.133 on the basis that they met Lord Steyn's test. In this respect, the number of successful applications under s.133 (which did not generate any litigation) post-*Mullen* may be significant.

D2. The landmark miscarriage of justice cases would not meet Lord Steyn's test.

69. The unduly restrictive nature of the 'innocence' test is illustrated by examining the Court of Appeal judgments which reversed a number of notorious miscarriages of justice, some of which led to the setting up of the CCRC. It is apparent from the Court's judgments that none of those defendants would receive compensation under s.133, because in none of their cases did the Court of Appeal, even if it considered that they were in fact innocent, go on to say so.

The Birmingham Six

70. The convictions of the Birmingham Six were quashed in *R v McIlkenny and others* [1992] 2 All ER 417; (1991) 93 Cr App R 287. The Court's analysis of its role, and the fact that it is not entitled to decide on guilt or innocence, has been considered above. The Court noted that the prosecution case at trial rested on two main areas of evidence: (a) forensic evidence suggesting that two of the defendants had had contact with nitroglycerine, and (b) written confessions of four of the defendants and oral confessions of the two other defendants. It noted that, in addition, 'there was a great deal of circumstantial evidence, including the evidence of witnesses who were entirely independent of the police.' (421)

Authorities Tab 36

[27] The 'new or newly discovered fact' must be the sole or principal reason for the reversal: *R (Murphy) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin). Authorities Tab 64

[28] See cases cited in fn 25, above.

71. Fresh evidence arose to cast doubt on the reliability of the scientific evidence and the confessions. The Court rejected the appellants' submission that that evidence ought not to have been admitted. (431) Considering the impact of the fresh evidence, the Court concluded that:

> 'One possibility is that the jury felt no doubt in accepting the police evidence at the trial. If so then the addition of the fresh evidence and in particular the evidence as to the McIlkenny interview, might well have caused them doubt. Another possibility, much pressed by Mr Mansfield in the course of his argument, is that the jury may already have been in doubt whether to accept the police evidence or not, by reason of the inconsistencies in the written confessions, or for some other reason. If so the scientific evidence, confidently expressed by Dr Skuse, may well have carried the day. Either way the impact on the jury of the fresh evidence would have been considerable.' (432)

72. It is apparent from the Court's conclusions that, applying Lord Bingham's test, this was a case where something went seriously wrong, and where compensation should be paid. On Lord Steyn's view, because the Court of Appeal did not state in terms that the defendants were innocent, they would receive no compensation under s.133. This is despite the fact that the Court considered it a matter of 'great constitutional importance' to refrain from pronouncing on innocence. Further, in indicating that he would award compensation to the Birmingham Six, Kenneth Baker, then Home Secretary, made it clear that he was not entitled to decide whether they were innocent or not.[29]

The Guildford Four

Authorities Tab 35

73. The convictions of the Guildford Four were quashed in *R v Richardson, Conlon, Armstrong, Hill, The Times*, 20 October 1989. Giving the judgment of the Court, Lord Lane CJ noted that disputed confessions by each defendant formed a central part of the prosecution case. He noted that

> 'it follows that any evidence which casts a real doubt upon the reliability or veracity of the officers who were responsible for the various interrogations must mean that the whole foundation of the prosecution case disappears and that the convictions will in those circumstances be obviously unsafe.' (Lawtel transcript, p.5)

74. Investigation of officers' notes and other documents relating to the interviews revealed that a vital statement by Hill 'might very well have been ruled inadmissible if the true circumstances of it had been known' (p.6). Other documents revealed 'material discrepancies

[29] See para. 61 above.

which, had they been known at the trial, might on their own, let alone in conjunction with those other matters, have made a grave difference to the outcome.' (p.6) These observations applied primarily to the cases of Armstrong and Hill. Dealing with the cases of Conlon and Richardson, the Court stated that:

> 'The cases against Conlon and Richardson are obviously intimately bound up with these events. We of course do not know what the jury would have made of the matter. Our task is to determine whether we think the convictions of Conlon and Richardson are made unsafe by what we have heard. We have no doubt that these events make the convictions of all these four appellants in respect of the Guildford and the Woolwich events unsafe, even though the latest revelations have no direct bearing on the evidence relating to the Woolwich bombing.' (p.6)

75. Again, these defendants would not receive compensation under Lord Steyn's test.[30]

The Maguire Seven

76. These convictions were quashed in *R v Maguire and Others* [1992] 1 QB 936. The seven appellants had been convicted of offences relating to the supply of explosives which had allegedly been used in the Guildford bombings. Following the *Richardson* decision (above), in which the Court of Appeal quashed the convictions of the Guildford Four, the Secretary of State appointed a judicial inquiry into the Richardson and Maguire cases. It came to light that, in the Maguire case, forensic scientists had not disclosed to the prosecution material which could have cast doubt on the scientific evidence relied upon by the prosecution as showing that the defendants had handled explosives. The Court of Appeal found that this constituted a material irregularity, and quashed the convictions. It considered that the possibility of innocent contamination could not, on the basis of the fresh evidence, be excluded, and therefore the convictions were unsafe. Again, this would fall short of what would be required for a successful claim under s.133, if Lord Steyn's interpretation were correct.

Authorities Tab 37

Authorities Tab 35

Judith Ward

77. This conviction was quashed in *R v Ward* [1993] 1 WLR 619. The appeal was based primarily on the non-disclosure of (a) evidence which cast doubt on the reliability of the scientific evidence which suggested recent contact with explosives; (b) interview records and medical reports which cast doubt on the reliability of the appellant's confessions. The Court (Glidewell, Nolan and Steyn LJJ) concluded that if:

Authorities Tab 39

[30] They did in fact receive compensation: see *Hansard* – Written Answers to Questions, 1st November 1989, Col 183-184.

Authorities Tab 94

> 'the evidence which should have been but was not disclosed had all been available to the defence, the prosecution's case would have been much weakened; the defence would have been strengthened in seeking to establish the appellant's unreliability; and the scientific evidence would have been shown to provide little if any support to the truth of her confessions.
>
> Our conclusion overall on the three heads of appeal is therefore that, in the failure to disclose evidence, some in the possession of the police, some in the possession of the scientists and some in the possession of the Director of Public Prosecutions, there were material irregularities at the trial; and that, having regard to that non-disclosure, added to the fresh evidence we have heard, the convictions were all unsafe and unsatisfactory. We therefore allow the appeal and quash the convictions of the appellant on all counts.' [692]

78. The Court did not pronounce Ward innocent, accordingly she would not receive compensation under s.133 if Lord Steyn's test were applied.

The Cardiff Three

Authorities Tab 38

79. These convictions were reversed in *R v Paris, Abdullahi and Miller* (16 December 1992). Although the evidence against the three defendants came from a number of different sources, central to the prosecution case were confessions by Miller, given in interview with the police. The Court of Appeal (Lord Taylor CJ giving the judgment of the Court) held that 'the Crown did not and could not discharge the burden upon them to prove beyond reasonable doubt that the confessions were not obtained by oppression or by interviews which were likely to render them unreliable.' [13E-F] Accordingly, the interviews ought not to have been admitted. The Court took the view that 'the impact of the lengthy interviews and the emphasis placed upon them by the Crown must have figured large in the jury's minds.' [14F] The Court did not consider that the remaining evidence 'could safely support a conviction in his case.' [15A]

80. Miller's conviction having been quashed on that basis, the Crown conceded – properly, in the Court's view – that the convictions of Abdullahi and Paris also fell to be quashed. [17C-E] While the Court was so concerned about the conduct of Miller's interviews that they directed that a copy of the tape be sent to Lord Runciman, then conducting the Royal Commission on Criminal Justice [25C], there is nothing in the judgment to indicate the Court's view of the guilt or innocence of the appellants. Again, this means that they would not receive compensation under s.133 if Lord Steyn's test were applied.

D3. *Mullen* could now be decided differently on its facts

81. A number of the miscarriage of justice cases considered above involved non-disclosure of evidence by the authorities. As well as the requirement of innocence, a further limit on the ambit of s.133 stems from the way in which the House of Lords dealt with the facts of Mullen's case. Lord Bingham at [7] considered that Mullen would not fall into his broader category, since he 'could not show any defect in his trial or the investigation leading up to it.' He analysed his case as one in which the wrongdoing had been completed *before* the trial: it did not count as a defect in the trial (or in the investigation of the offence), and would not therefore fall within even the broader interpretation of s.133.

82. In *Maguire*, considering the meaning of s.2(1)(c) of the un-amended 1968 Act, the Court (Stuart-Smith LJ giving the judgment of the Court) stated that: Authorities Tab 37

> 'The court has now consistently taken the view that a failure to disclose what is known or possessed and which ought to have been disclosed, is an 'irregularity in the course of the trial.' Why there was no disclosure is an irrelevant question, and if it be asked how the irregularity was 'in the course of the trial' it can be answered that the duty of disclosure is a continuing one.' [957B-C]

83. In that case, prosecution counsel and those instructing them were unaware of the evidence which cast doubt on the tests. Only the scientists had been aware of it [957F-G]. The Court considered that this did not make a difference:

> 'We are of the opinion that a forensic scientist who is an adviser to the prosecuting authority is under a duty to disclose material of which he knows and which may have "some bearing on the offence charged and the surrounding circumstances of the case". The disclosure will be to the authority which retains him and which must in turn (subject to sensitivity) disclose the information to the defence. We hold that there is such a duty because we can see no cause to distinguish between members of the prosecuting authority and those advising it in the capacity of a forensic scientist. Such a distinction could involve difficult and contested inquiries as to where knowledge stopped but, most importantly, would be entirely counter to the desirability of ameliorating the disparity of scientific resources as between the Crown and the subject. Accordingly we hold that there can be a material irregularity in the course of the trial when a forensic scientist advising the prosecution has not disclosed material of the type to which we have referred.' [958D-F]

84. *Maguire* indicates that:

(1) A failure to disclose what is known or possessed and which ought to have been disclosed, is an 'irregularity in the course of the trial.'

(2) The duty of disclosure is a continuing one.

(3) The duty applies to information which is in the possession of those upon whom the prosecution legal team relies for the provision of information, as well as information of which the legal team is actually aware.

85. In Mullen's case, the Secret Intelligence Service, and presumably the police, breached this continuing duty of disclosure by failing to reveal to the prosecution that Mullen had been brought to the UK unlawfully: see pp.535-536 of the judgment of the Court of Appeal (Criminal Division) in *R v Mullen* [2000] QB 520, per Rose LJ. The House of Lords approached the question of compensation on the basis that Mr Mullen ought not to have been tried at all, and therefore that the undisputed serious wrongdoing by the authorities fell entirely outside the trial process. However, during that trial, as in *Maguire*, there was serious non-disclosure of evidence which, if it had been disclosed, would have led to a successful defence application for a stay on the ground of abuse of process. *Maguire* establishes that the reasons for that non-disclosure are immaterial. Their Lordships in *Mullen* did not consider the prosecution obligations of disclosure. In any event, the present *Attorney General's Guidelines on Disclosure of Information in Criminal Proceedings*, which were issued in April 2005, are more stringent than those in place when *Mullen* was decided. Paragraph 10(b)(ii) of the Guidelines specifically covers material which could support submissions that could lead to a stay of proceedings. The *CPS Legal Guidance, Disclosure Manual* (which applies to investigations post-April 2005) at Chapter 2, [7] also requires disclosure (pre-trial) of 'material which might enable an accused to make a pre-committal application to stay the proceedings as an abuse of process'.

Authorities Tab 49

Authorities Tab 170

Authorities Tab 176

86. These considerations led Leveson LJ to conclude, in *R (Siddall) v Secretary of State for Justice* [2009] EWHC 482 (Admin) at [47]-[48], that 'Lord Bingham's second limb would not today necessarily lead to the same decision should similar circumstances to *Mullen* arise', and that '<u>it is thus inconceivable that a failure by an investigator or prosecutor to disclose *Mullen* type circumstances should not be characterised as something seriously wrong in the conduct of the trial if not the investigation</u>.' JUSTICE submits that this is correct: *Mullen* would today be analysed as falling into Lord Bingham's second category. It is submitted that this is also the proper approach to the case of *MacDermott and McCartney*. In that case, there had been a failure to disclose material in the possession of the DPP which indicated the basis on which a defence witness had not been prosecuted for a separate offence. This was highly relevant to the defence, and had not been supplied to prosecuting counsel: [5] (and see fuller statement of the facts at [6]-[7] of the judgment of Weatherup J at first instance).

Authorities Tab 73

Authorities Tab 74

Conclusion on Issue D

87. The restrictive interpretation of 'miscarriage of justice', allowing compensation only in cases where the Court of Appeal has stepped beyond its role and pronounced on the innocence of the appellant, is so narrow that none of the appellants in the notorious miscarriage of justice cases considered above would have received compensation under s.133. This is despite the fact that some of those cases led directly to the setting up of the CCRC. JUSTICE submits that any interpretation of s.133 which would deny compensation to the Birmingham Six, for example, for the many years of wrongful imprisonment which they suffered is overly restrictive and cannot fulfil the UK's international obligations. Further, an examination of the facts of *Mullen* indicates that, on its facts, it may well be decided differently today. *Mullen* should not be taken to stand for the proposition that cases of material non-disclosure necessarily fail Lord Bingham's test.

E. ALTERNATIVE REMEDIES

88. The availability, or non-availability, of private law remedies has no bearing on the proper interpretation of s.133, which requires that a person who fulfils the conditions set out there 'shall be compensated according to law.' It is clear that Parliament intended s.133 to fulfil the UK's international obligations in full. In any event, however, it is submitted that it must have been the intention behind s.133 to make compensation available in a wider category of cases than those in which the defendant could claim damages in private law. That was the intention of the *ex gratia* scheme, for example, which pre-dated s.133 and which, before 1988, gave effect to the UK's obligations under Article 14(6) ICCPR. In a written answer on 29 July 1976, the then Home Secretary Roy Jenkins stated that a payment under the *ex gratia* scheme:

> 'is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give rise to no grounds for a claim for civil damages.'[31]

89. Neither the police nor the CPS can be sued for negligent[32] investigative or prosecutorial decisions: *Hill v Chief Constable of West Yorkshire* [1989] AC 53 Hill, *Elguzouli-Daf v Commissioner of Police of the Metropolis and Another* [1995] QB 335. Actions may lie against the police or CPS in malicious prosecution or misfeasance in public office. However, such claims require proof of malice, which will be very difficult to establish, even where something has gone seriously wrong with the conduct of the trial.

Authorities Tab 34

Authorities Tab 42

[31] Hansard (HC Debates), 29 July 1976, cols 328-330.

Authorities Tab 93

[32] c.f. Printed Case of MacDermott and McCartney at [23].

90. Further, in order to receive an award of damages under either head (and in order to make out the elements of the tort of misfeasance), the claimant would have to demonstrate that the malicious conduct caused him actual loss (*Watkins v Secretary of State for the Home Department* [2006] 2 AC 395). In practice, if he could not show that, but for the conduct, he would have been acquitted (which in this example he could not, since otherwise he would receive compensation under the narrow interpretation of s.133), it would be difficult to demonstrate that the wrongful conduct caused loss. This may be possible in the very rare cases where the wrongful conduct meant that there was a trial when otherwise there would have been none. But in cases of non-disclosure, or even fabrication, of evidence, this is unlikely to be the case.

Authorities Tab 67

91. A negligence claim against the defendant's trial lawyers would now be possible, in light of *Arthur JS Hall & Co v Simons* [2002] 1 AC 615. However, in order to obtain damages the defendant would have to demonstrate that the negligence of his legal representatives caused him loss: effectively, that he would have been acquitted but for their negligent acts or omissions. Again, such a defendant is likely to be able to obtain compensation under s.133 in any event, so the availability of a negligence claim does not in practice extend the scope of compensation in such cases.

Authorities Tab 55

92. Likewise, the availability or non-availability of damages as part of public law remedies (e.g. a damages claim as part of a judicial review) is irrelevant to the proper interpretation of s.133. Claims against a judge or magistrate would face considerable difficulties in light of the principle of judicial immunity. Sections 31-35 of the Courts Act 2003 permit civil actions in respect only of bad faith acts by magistrates. In any event, cases leading to serious miscarriages of justice are likely to be conducted by judges in the Crown Court, rather than in the magistrates' court. Courts are public authorities for the purposes of the Human Rights Act 1998,[33] but section 9(1) of the Act provides that proceedings may only be brought in respect of a judicial act by way of appeal or judicial review, or in such other forum as prescribed by rules. Section 9(3) provides that, in respect of a judicial act done in good faith, 'damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.'

Authorities Tab 6

93. In *Mullen*, Lord Bingham suggested that Mullen may have been able to bring a damages claim under Article 5(5) of the Convention [7]. Whether or not such a claim would succeed on the unusual facts of that case, in most cases of miscarriage of justice arising out of non-disclosure at trial, such a claim will not be possible. The defendant's imprisonment following trial would be analysed, in Article 5 terms, as flowing from the conviction of a competent court, and would therefore

Authorities Tab 61

[33] So the case of *McFarland* [2004] 1 WLR 1289, in which the House of Lords decided that judges and magistrates were not 'public authorities' for the purposes of the *ex gratia* scheme, would probably now be differently decided, but the *ex gratia* scheme has in any event been abolished, so no longer offers a route to compensation for those convicted on the basis of wrongful judicial acts.

A not give rise to a damages claim under Article 5(5), even if subsequently reversed.[34]

94. In bringing any such claim, a person whose conviction has been reversed at an out of time appeal may also face difficulties with the various limitation periods for civil claims.

95. The above brief analysis demonstrates that, even if it were appropriate B for civil claims to form a safety net to ameliorate the harshness of the restrictive interpretation of s.133, they are unlikely to provide effective redress in many cases, even where a conviction has been reversed out of time. In any event, Article 14(6), as consistently interpreted by the UK from before the enactment of s.133, must be fulfilled by the payment of compensation by the State without the defendant having to go through the expense, length and uncertainty of civil litigation.

C

F. THE PRESUMPTION OF INNOCENCE

96. JUSTICE adopts the submissions of the Appellant *Adams* in his Printed Case at [4.17]-[4.38] in relation to this issue and makes the following additional submissions.

D 97. The caselaw on the presumption of innocence under Article 6 of the European Convention on Human Rights is not directly relevant to the interpretation of Article 14(6) ICCPR: c.f. *Mullen* at [10] and [38]. But since Article 14(6) ICCPR has been incorporated into domestic law by s.133, this means that s.6 of the Human Rights Act necessarily applies to proceedings concerning applications under s.133. Such applications plainly involve at the very least the determination of the applicant's civil rights within the meaning of Article 6(1) of the E Convention. In fact, since proceedings for compensation for a miscarriage of justice following acquittal are a direct consequence of the substantive criminal proceedings, JUSTICE's primary submission is that Article 6(2) applies to any proceedings resulting from an application under s.133: see, in particular, the Austrian Strasbourg cases considered below.

Authorities Tab 11

Authorities Tab 6

98. It is entirely permissible to rely on the Convention indirectly in this F way. Article 53 provides that the Convention is a floor of rights: it can be used to supplement rights derived from other international agreements (e.g. the ICCPR) but it cannot be used to limit such rights. Article 53 ECHR is a further reason, in addition to those given by Lord Bingham in *Mullen* at [9(4)], why Article 3 of Protocol 7 ECHR cannot be used to narrow the meaning of 'miscarriage of justice' in Article 14(6) ICCPR.[35]

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[34] See *R (Conlon) v Secretary of State for the Home Department* [2001] A.C.D 296, QBD (Thomas J).

Authorities Tab 53

[35] See also the Printed Case of Adams at [4.39]-[4.40].

99. In any event, the presumption of innocence is an important principle of English law, the nature of which is inevitably informed by decisions including those under Article 6.

Authorities Tab 71

100. In *S and Marper v United Kingdom* (2008) 48 EHRR 1169, the Grand Chamber emphasised, in the context of the retention of DNA of un-convicted persons, that '…the Court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal.' [122]

101. A series of Article 6 cases indicates that the presumption applies, not only to the criminal trial itself, but to other related proceedings, including proceedings outside the criminal trial for compensation for incarceration, which follow on from an acquittal.

Authorities Tab 14

102. In *Sekanina v Austria* (1993) 17 EHRR 221, the European Court of Human Rights approached the matter as follows:

> 'Such affirmations [of suspicion by the court which determined whether to award compensation for time on remand] - not corroborated by the judgment acquitting the applicant or by the record of the jury's deliberations - left open a doubt both as to the applicant's innocence and as to the correctness of the Assize Court's verdict. Despite the fact that there had been a final decision acquitting Mr Sekanina, the courts which had to rule on the claim for compensation undertook an assessment of the applicant's guilt on the basis of the contents of the Assize Court file. The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final. Consequently, the reasoning of the Linz Regional Court and the Linz Court of Appeal is incompatible with the presumption of innocence. Accordingly, there has been a violation of Article 6(2).' [30]

Authorities Tab 15

103. In *Asan Rushiti v Austria* (2000) 33 EHRR 56, the Court considered the case of an application outside the criminal trial, following an acquittal in criminal proceedings, for compensation for detention on remand. The Court held that Article 6(2) was applicable to the compensation proceedings, as Austrian legislation and practice linked the two issues of criminal responsibility and compensation to such a degree that the decisions on the latter issue could be regarded as a consequence and, to some extent, the concomitant of the decision on the former ([27]). The Court concluded at [31]:

> '...the Court is not convinced by the Government's principal argument, namely that a voicing of suspicions is acceptable under Article 6 § 2 if those suspicions have already been expressed in the reasons for the acquittal. The Court finds that this is an artificial interpretation of the Sekanina judgment,

A

which would moreover not be in line with the general aim of the presumption of innocence which is to protect the accused against any judicial decision or other statements by State officials amounting to an assessment of the applicant's guilt without him having previously been proved guilty according to law (see *Allenet de Ribemont v France* (1995) 20 EHRR 557 at § 35, with further references). The court cannot but affirm the general rule stated in the *Sekanina* judgment [(1993) 17 EHRR 221] that, following an acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible. The court, thus, considers that once an acquittal has become final - be it an acquittal giving the accused the benefit of the doubt in accordance with article 6(2) - the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence.

Authorities Tab 14

B

C

In the present case, the Graz Court of Appeal made statements in the compensation proceedings following the applicant's final acquittal which expressed that there was a continuing suspicion against him and, thus, cast doubt on his innocence. Accordingly, there has been a violation of Article 6(2) of the Convention.'[36] [Emphasis added]

104. *Rushiti* was followed by the Court in *Lamanna v Austria* (App no. 28923/95, 10 July 2001) at [39]-[41]. The Court held that it was irrelevant whether the statements casting suspicion on the acquitted defendant were made immediately after his acquittal or at subsequent compensation proceedings:

Authorities Tab 111

D

'What is decisive is that both the Salzburg Regional Court and the Linz Court of Appeal made statements in the compensation proceedings following the applicant's final acquittal, expressing the view that there was a continuing suspicion against him and, thus, casting doubt on his innocence.

E

Accordingly, there has been a violation of Article 6(2) of the Convention.'

105. In *Geerings v The Netherlands* (2007) 46 EHRR 1212[37] at [41]-[42], the Court summarised the relevant caselaw as follows:

Authorities Tab 119

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[36] *Sekanina v Austria* (1993) 17 EHRR 221 was also followed in *Weixelbraun v Austria* (2003) 36 EHRR 45. In *O v Norway* (App. No. 29327/95, 11 Feb 2003) and *Hammern v Norway* (App No 30287/96, 11 Feb 2003), the Court reached a similar conclusion where a Norwegian court, sitting with a jury, had acquitted the defendant but the judges had then refused compensation on the basis that the statute required the defendant to show on the balance of probabilities that he had not committed the offence of which he had been acquitted.

Authorities Tabs 14, 113, 114 & 16

[37] Considered in *Briggs-Price* [2009] 1 AC 1026 and *Gale v SOCA* [2010] 1 WLR 2881, CA (permission to appeal to UKSC granted on 18 Oct 2010). In *Briggs-Price* the House of Lords held, by a majority, that although the presumption of innocence in Article 6(2) did not apply to confiscation proceedings, the presumption of innocence within the fair trial requirement under Article 6(1) did apply to such proceedings. That was so even though the confiscation proceedings applied to conduct (cannabis distribution) of which the appellant had not been convicted (he had been convicted only of conspiracy to import heroin).

Authorities Tab 78 & 82

G

'The Court reiterates that the presumption of innocence, guaranteed by Article 6§2, will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law (see *Deweer v Belgium*, judgment of 27 February 1980, Series A no. 35, § 56; and *Minelli v Switzerland*, judgment of 25 March 1983, Series A no. 62, § 37). Furthermore, the scope of Article 6§2 is not limited to criminal proceedings that are pending (see *Allenet de Ribemont v France*, judgment of 10 February 1995, Series A no. 308, § 35).

Authorities Tabs 106 & 108

In certain instances, the Court has also found this provision applicable to judicial decisions taken following an acquittal (see *Sekanina v Austria*, judgment of 25 August 1993, Series A no. 266-A, §22; *Asan Rushiti v Austria*, no. 28389/95, §27, 21 March 2000; and *Lamanna v Austria*, no. 28923/95, 10 July 2001). The latter judgments concerned proceedings relating to such matters as an accused's obligation to bear court costs and prosecution expenses, a claim for reimbursement of his necessary costs, or compensation for detention on remand, and which were found to constitute a consequence and the concomitant of the substantive criminal proceedings.'[38] [Emphasis added]

Authorities Tabs 14, 15 & 111

106. This approach was recently re-endorsed in the Croatian cases of *Šikić v Croatia* (App No. 9143/08, 15 Jul 2010) at [52] and *Vanjak v Croatia* (App no. 29889/04, 14 Jan 2010) at [67]; approving *Sekanina*.

Authorities Tabs 130, 131 & 14

107. The combined effect of the clear and constant jurisprudence in the Austrian Strasbourg cases is that the presumption of innocence applies to proceedings for compensation following an acquittal and prevents the voicing of any suspicion against the acquitted person, whether by a judge or any other public official, once the acquittal is final. Accordingly, on closer analysis, the 'workable' solution of Lord Steyn in fact involves a violation of Article 6(2): for the Home Secretary to decide to withhold compensation under s.133 on the basis that the applicant is not innocent necessarily requires the Home Secretary (a) to make a statement that the applicant is tainted with some residual suspicion; (b) to rely upon the criminal Court of Appeal's pronouncement of suspicion. Both would unavoidably involve a violation of Article 6(2). The same applies to the Court's role when considering a judicial review of the Home Secretary's decision not to grant compensation under s.133.

[38] See also *O v Norway* (App. No. 29327/95, 11 Feb 2003) at [38]: 'Thus the compensation claim not only followed the criminal proceedings in time, but was also tied to those proceedings in legislation and practice, with regard to both jurisdiction and subject matter … the Court considers that in the circumstances the conditions for obtaining compensation were linked to the issue of criminal responsibility in such a manner as to bring the proceedings within the scope of article 6(2)…' c.f. *Orr v Norway* (App. No. 31283/04; 15 May 2008).

Authorities Tab 114

Authorities Tab 125

108. It is submitted that Lord Bingham's distinction between acquittals based on matters entirely unrelated to the merits of the accusation and acquittals based on the merits (*Mullen* at [10]) is not consistent with subsequent Strasbourg case law, for example dealing with defendants' costs applications following acquittal (see *Hussain v United Kingdom* (2006) 43 EHRR 22, below). If a defendant is 'acquitted on a technicality', i.e. on matters unrelated to the merits, that does not entitle the presumption of innocence to be displaced entirely. And although, as Lord Steyn noted at [41], the Austrian cases did not consider the link between Article 6(2) and Article 3 of Protocol 7[39], that cannot usurp the operation of Article 6(2) as it applies to domestic compensation proceedings – by virtue of s.6 of the Human Rights Act.

Authorities Tab 116

109. The Strasbourg Court has also considered the presumption of innocence in a series of cases on costs for an acquitted defendant. In *Hussain v United Kingdom* (2006) 43 EHRR 22, the trial judge refused to make a costs order in the defendant's favour following his acquittal, on the basis that there was 'compelling evidence' against the defendant. In finding a violation of Article 6(2), the Court held that:

Authorities Tab 116

> 'The Court reiterates that the presumption of innocence enshrined in Article 6(2) is one of the elements of a fair criminal trial required by Article 6(1). It will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty unless he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards that person as guilty … Whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made … The provision applies even where the substantive criminal proceedings have ended, provided that there is a sufficient nexus between the criminal proceedings and the events in issue … In such circumstances, the question is whether the trial judge relied on suspicions as to the applicant's innocence after the applicant had been acquitted.' ([19], references omitted)

110. Refusal to award an acquitted defendant his costs on the basis that he was 'acquitted on a technicality', i.e. by reason of matters unrelated to the merits of the case, is therefore inconsistent with the presumption of innocence. This was recently re-emphasised in *Emohare v Thames Magistrates' Court* [2009] EWHC 689 (Admin), DC at [27]-[28]: '[the Costs Practice Direction] is narrowly drawn in conjunctive terms because of the need to respect the presumption of innocence both at common law and under Article 6 of the European Convention on Human Rights'. Indeed, as Lord Bingham CJ noted in *R v South West Surrey Justices ex p James* [2000] Crim LR 690 (18 Apr 2000), which was followed in *Emohare*, a previous version of the *Costs Practice*

Authorities Tab 72

Authorities Tab 50

[39] Which has still not been signed or ratified by the United Kingdom.

Direction was specifically amended so as to remove the words 'there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit.' The current *Practice Direction (Costs in Criminal Proceedings)* (30 Jul 2010) at [2.1.1]-[2.2.2] does not contain such a provision – it would violate the presumption. In the circumstances, it is submitted that Lord Bingham's distinction in *Mullen* at [10], based on 'acquittals which are not based on the merits', must now be viewed as incorrect.[40]

111. The fundamental nature of the presumption as it applies more generally outside criminal proceedings was recently re-emphasised by Lord Rodger in *In the matter of Guardian News and Media Ltd* [2010] 2 WLR 325, when considering the anonymity of those subject to asset freezing orders on the basis of their suspected involvement in terrorism:

Authorities Tab 81

> '… the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, a fortiori, if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court. But, by concealing the identities of the individuals who are subject to freezing orders, the courts are actually helping to foster an impression that the mere making of the orders justifies sinister conclusions about these individuals. That is particularly unfortunate when, as was emphasised on the appellants' behalf, they are unlikely to have any opportunity to challenge the alleged factual basis for making the orders.' [66]

112. The Court of Appeal in *R (Allen, formerly Harris) v Secretary of State for Justice* [2008] EWCA Civ 808 at [35] rejected some of the arguments advanced above. It is submitted that the Court of Appeal's reasoning in *Allen* was wrong in the following key respects:

Authorities Tab 9

a. Although the Austrian and Norwegian Strasbourg cases do not directly consider compensation under Article 14(6) ICCPR, that does not of itself oust or disable the operation of Article 6(2) ECHR in relation to such proceedings. The Secretary of State and domestic courts are obliged to act compatibly with Article 6(2) in relation to s.133 by virtue of s.6 of the Human Rights Act.

b. Although the UN Human Rights Committee decided in *WJH v The Netherlands* (Comm No 408/1990, 31 Jul 1992) that Article 14(2) ICCPR only applied to criminal proceedings and not to an application for compensation[41], the Strasbourg authorities

Authorities Tab 102

Authorities Tab 109

[40] JUSTICE notes that, in the course of its reasoning in *Leutscher v The Netherlands* (1996) 24 EHRR 181 (cited by Lord Bingham at [10]), the Court did not draw a clear distinction between an acquittal on the merits and on a technical basis.

Authorities Tab 104

[41] The position regarding the operation of the presumption of innocence in relation to Article 14(6) was left open by the Human Rights Committee in the subsequent case of *Dumont v Canada* (Comm No 1467/2006, 16 March 2010) at [23.5].

(considered above) indicate that Article 6(2) does apply to proceedings outside the criminal trial in many different contexts, including compensation proceedings. Although s.133 proceedings give effect to Article 14(6) of the ICCPR (rather than any ECHR obligation), Article 6(2) also applies to such proceedings, irrespective of whether or not Article 14(2) ICCPR applies to such proceedings.

c. Article 3 of Protocol 7 together with Article 6(2) of the ECHR would only mean that 'compensation necessarily followed the quashing of a conviction on the basis of fresh evidence'[42] if innocence were the sole criterion for s.133. For all the reasons above, it is not and should not be the determinative criterion. Under Lord Bingham's formulation, a successful s.133 applicant must establish much more than mere acquittal following fresh evidence in order to prove that a miscarriage of justice has indeed occurred.[43]

Authorities Tab 11

d. The Court of Appeal was wrong to distinguish all the Strasbourg caselaw on the basis that s.133 proceedings are 'not linked to any acquittal on the merits.[44] First, if innocence were the sole criterion under s.133 then plainly such proceedings would be linked to an acquittal on the merits. Second, as the Strasbourg cases on costs following acquittals demonstrate, the presumption of innocence does not make any distinction between 'acquittals on the merits' and 'technical acquittals', so s.133 proceedings are all necessarily linked to acquittals (whether on the merits or otherwise).

e. The contention that if the presumption of innocence were to apply, then 'there would be no obvious reason for distinguishing between those who are convicted but whose convictions are quashed, and those who are acquitted at trial' proves too much. First, the fact that compensation ought also arguably to apply to a wider class of persons cannot thereby narrow the class of persons to whom it does unquestionably apply.[45] Second, many European countries do also award compensation to defendants acquitted at trial: see, for example, the jurisdictions considered by JR Spencer QC in 'Compensation for Wrongful Imprisonment' [2010] Crim LR 803 at 816. And, as the Austrian cases demonstrate, some jurisdictions also award compensation for time spent on remand following an acquittal at trial. It would be unprincipled and unjust if Article 6(2) did apply to those proceedings but not s.133 compensation proceedings.

Authorities Tab 157

113. JUSTICE submits that respect for the presumption of innocence requires compensation for all those who should not have been convicted. To withhold compensation from a person who has spent many years in prison on the basis of a conviction which has been definitively quashed by the Court of Appeal, on the basis that the

[42] *Allen* at [35(iii)].

[43] c.f. Printed Case of MacDermott and McCartney at [20].

[44] *Allen* at [35(vii)].

[45] c.f. Printed Case of Adams at [4.26]

Court did not go beyond its statutory remit and pronounce on the person's innocence:

(1) Is unduly narrow, for the reasons set out in the preceding sections of these submissions; and

(2) Undermines the principle of the presumption of innocence, in that it involves the Secretary of State in publicly selecting from quashed convictions – all of which amount to an acquittal in the eyes of the law – in order to determine which defendants he considers to be 'truly' innocent. It creates a class of 'pseudo-innocent', non-convicted defendants to whom suspicion forever publicly attaches. It violates Article 6(1) and/or Article 6(2) ECHR and is therefore unlawful in domestic law.

CONCLUSION

114. These appeals represent an important opportunity for the Supreme Court to give the authoritative interpretation of 'miscarriage of justice' in section 133 of the Criminal Justice Act 1988. The proper meaning of the term is even more significant following the abolition of the *ex gratia* scheme. The courts below have regularly grappled with the judgment in *Mullen* – usually opting to apply the formulation of both Lord Bingham and Lord Steyn, rather than having to express a preference between the two. That is a most unsatisfactory state of affairs. The meaning of the term, dating from a statute which is over 20 years old and which gives effect to an international treaty which the United Kingdom ratified over 30 years ago, ought now to be settled.

115. For all the reasons above, including those based on the material which was not considered by the House of Lords in *Mullen*, JUSTICE submits that Lord Bingham's formulation of the term in *Mullen* is correct and ought to followed and applied by the Supreme Court. When Parliament incorporated Article 14(6) by enacting s.133 it intended, as the *travaux* demonstrate that it was permitted to do, to give 'miscarriage of justice' a meaning synonymous with Lord Bingham's formulation.

ALEX BAILIN OC

ALISON MACDONALD

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)

BETWEEN:

R
(on the application of ANDREW ADAMS)

Appellant

v

THE SECRETARY OF STATE FOR JUSTICE

Respondent

JUSTICE

Intervener

AND

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

EAMONN MacDERMOTT

and

RAYMOND PIUS McCARTNEY

Appellants

v

THE SECRETARY OF STATE FOR NORTHERN IRELAND

Respondent

JUSTICE

Intervener

CASE FOR THE INTERVENER

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