Anti-social Behaviour, Crime and Policing Bill
House of Lords Report Stage

Briefing and suggested amendments on compensation for miscarriages of justice

January 2014

Introduction

Section 133 of the Criminal Justice Act 1988 provides compensation for those who have suffered punishment following a miscarriage of justice. The Government amendment in clauses 161 of the Bill would seek to define 'miscarriage of justice' in legislation limited only to a new or newly discovered fact that shows beyond reasonable doubt that the person is innocent. While we agree that it is helpful to define 'miscarriage of justice' in legislation, we wholly disagree with its limitation to cases where the innocence of the person can be shown. This is an affront to the common law presumption of innocence long held in the UK, as well as our obligations under the European Convention on Human Rights. It would exclude an important category of people for whom the new facts cannot demonstrate innocence, but do so undermine the evidence that no conviction should have been brought against them. Many of these people have spent significant periods in prison and have endured hardship, stigma and deprivation as the result of wrongful conviction. It is unfair and unreasonable to deny them compensation for that treatment.

We urge Peers to support the following suggested amendment in this regard.

Clause 161 compensation for miscarriages of justice

Amendment proposed by Lord Pannick and supported by Baroness Kennedy and Baroness O'Loan

Page **128**, line **5**, leave out "beyond reasonable doubt that the person was innocent of the offence" and insert "conclusively that the evidence against the person at trial is so undermined that no conviction could possibly be based on it"

Briefing

1. The Impact Assessment for the Bill explains that:

> [R]ecent decisions by the courts have exposed conflicting interpretations of the term "miscarriage of justice" and this provision will provide greater clarity and certainty as to eligibility for State compensation. By confirming a relatively narrow definition, the provision would generate a more transparent, predictable and consistent approach to identifying cases where a miscarriage of justice has taken place. [1]

We agree that courts produced a series of decisions concerning how the term miscarriage of justice ought to be interpreted over the past few years. However, that debate concluded in 2011 with the decision of the UK Supreme Court in *Adams.*[2] There, a nine judge bench over 159 pages carefully considered the prior case law and origins of s133 before reaching a majority decision that the test for miscarriage of justice should not be limited to innocence cases. The decision provides the strongest precedent and settles the judicial uncertainty. The Government amendment ignores that careful judgment and seeks to narrow the test to innocence in full knowledge that it would exclude deserving applicants from seeking compensation.[3] As Lord Philips explained, an innocence test,

> [W]ill deprive some defendants who are in fact innocent and who succeed in having their convictions quashed on the grounds of fresh evidence from obtaining compensation. It will exclude from entitlement to compensation those who no longer seem likely to be guilty, but whose innocence is not established beyond reasonable

[1] P. 37.

[2] [2012] 1 AC 48.

[3] Nor does an innocence test 'restore' the prior position, since Lord Steyn's requirement for 'clear innocence' was only stated in 2004 in the case of *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, and Lord Bingham in the same case reached a conclusion requiring a much wider test than innocence. The Supreme Court in *Adams* was tasked with settling the debate.

doubt. This is a heavy price to pay for ensuring that no guilty person is ever the recipient of compensation.[4]

2. The test proposed by Lord Philips forms Lord Pannick's amendment: A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.[5] The Court in explaining how this test would work in practice referred to the process in the criminal courts of the 'no case to answer' submission[6] – where there is insufficient evidence to be left to the jury, the Court will withdraw the case and the defendant will be acquitted. This is not a finding of innocence, but it is a finding that no case should have been brought on the facts as shown at trial. Judges in the Court of Appeal have to make a decision based on new facts, and it is helpful in a complex case to consider what the jury might do.[7] If the evidence against the defendant is made unclear by the new fact, this is enough to find a conviction unsafe. But we agree with the Court in *Adams* that for a decision on compensation, something more conclusive is required. New facts demonstrating that a jury would not possibly have convicted on the evidence now known will, in almost all cases, be the strongest indication of innocence that can be found in a criminal appeal. The focus of whether it is right for the State to pay compensation should not be whether innocence can be conclusively proved, but the converse, whether guilt cannot. As Lady Hale concluded, 'if it can be conclusively proven that the State was not entitled to punish a person, it seems to me he should be entitled to compensation for having been punished.'[8]

3. Types of case that might fall into Lord Pannick's proposed amendment would include:

   (a) A defendant gives no account at interview or at trial; the only evidence against him is that of a single witness; he is convicted on the basis of that evidence together with the supporting evidence of his own silence. If the evidence of the sole witness were subsequently shown to be wholly wrong, whether due to improper motive by the witness or simply by mistake, there would be no evidence of his guilt and a conviction could not possibly stand against him. Because he exercised his right to silence, he cannot prove his innocence, but there is no evidence of his guilt;[9]

---

[4] At [50].

[5] At [55].

[6] In particular Lord Kerr and Lord Clarke. The High Court in *R (Ali and others) v Secretary of State for Justice* [2013] 1 WLR 3536 was not disagreeing with the decision in *Adams* and suggesting that the category of cases open to compensation should be wider, but merely using a practical way of describing the test.

[7] *R v Pendleton* [2002] 1 WLR 72.

[8] *Adams* at [116].

[9] This example was given in *R (on the application of Clibery)* v *Secretary of State for the Home Department* [2007] EWHC 1855 Admin (unreported, 20th July 2007). Lord Hope in *Adams* provides a similar example at [83].

(b) The prosecution case *depends* on the confession of the defendant, which is later shown by a newly discovered fact to have been extracted by the police through oppression and mistreatment. There is no other evidence upon which a jury could convict without the confession, which would have been inadmissible at trial[10];

(c) Where the scientific opinion against the defendant is later shown to be based on an inaccurate assessment of the forensic evidence, which may not conclusively provide an alternative explanation, yet may point to this being so strong a possibility that a conviction ought not to have been brought.[11]

4. The Government's stated aim of increasing clarity will be achieved with the insertion of any definition into legislation. However a test which is designed purely to reduce the number of individuals who seek to bring an appeal appears to us to be highly unprincipled and unjustified. It is already necessary for a person claiming under s133 to have (i) appealed out of time and (ii) discovered a new fact not available at trial. With only 40-50 claims a year, we do not think it unreasonable, given the terms of imprisonment those claimants have endured, to provide an assessment process in which an opportunity for a finding of entitlement may be made. We therefore think the reasons for reducing the test to one of innocence alone are flawed and unreasonable[12].

---

[10] These are the circumstances of the cases of Raymond McCartney and Eamonn MacDermott in *Adams*, which the majority concluded were entitled to compensation. The case of Paul Blackburn was also of this nature http://www.innocent.org.uk/cases/paulblackburn/

[11] Consider the cases of Sally Clark http://www.sallyclark.org.uk/ and Angela Cannings http://innocent.org.uk/cases/angelacannings/.

[12] Compensation is not simply recognition of punishment suffered. It is provides essential assistance to the acquitted person who not only has no income to support themselves (possibly now with a lost opportunity for education and a career), but who needs support in coming to terms with their loss and their freedom. Some are not able to do so, such as Sally Clarke who tragically died only a few years after her conviction was quashed. JUSTICE's 1999 Annual Report explained that 'psychiatrists with expertise in treating people released suddenly from prison are clear that they need immediate specialist treatment and aftercare if they are to make a successful transition to life outside prison.' Two examples of JUSTICE's previous casework reveal people desperately in need of assistance: Andrew Evans aged 17, vulnerable, immature and depressed, suffered from a condition (discovered and argued successfully on appeal) which made him susceptible to police accusations against him. He was convicted solely on his own confession. Upon release in December 1997, having served 25 years, psychiatric and social work experts were unanimous that he required the equivalent of a hostage retrieval programme to manage the transition to freedom. Even the court expressed concern about his immediate aftercare. JUSTICE had to borrow money for the intensive psychiatric help he needed, not available on the NHS, as the Home Office refused to meet the cost from his compensation award. He and his family are clear that without the treatment provided on his release he would have been unable to cope with life outside prison. (JUSTICE Annual Reports 1998 and 2000). Ashley King was convicted of murder on confession evidence aged 21, disadvantaged and vulnerable. No forensic or eyewitness evidence linked him to the crime. JUSTICE obtained psychological evidence of his suggestibility, which was agreed by the prosecution. Having served 14 years in prison, he was released onto the steps of the Royal Courts of Justice in 1999 in the middle of December wearing only a t-shirt, and with all his possessions in a plastic bag clearly marked 'HM Prison Service'. He received a discharge grant and a travel warrant wrongly dated and had no idea how to get home to Newcastle, let alone how to obtain the other assistance he would need. JUSTICE's legal officer gave him her coat, put him on the Newcastle train, and arranged for probation officers to meet him there (JUSTICE Annual Report 2000).

The presumption of innocence

5. Article 6(2) of the European Convention on Human Rights provides that every person is entitled to be presumed innocent until proven guilty. The European Court of Human Rights (ECtHR) has held that this extends to situations following acquittal and to the assessment of compensation under s133 because:

> Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt.[13]

6. The Government argues that the decision of the Grand Chamber in *Allen v UK*[14] does not prevent clause 161 being made law because it does not say that a test of innocence would breach article 6(2). We wholly disagree. The Grand Chamber reviewed its many previous decisions regarding the application of article 6(2) and drew these significant and important conclusions:

- In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6(2);[15]
- The criteria in s133 reflect, with only minor linguistic changes, the provisions of article 3 of Protocol 7 to the Convention, which must be capable of being read in a manner which is compatible with Article 6(2).[16] There is nothing in the criteria themselves which calls into question the innocence of an acquitted person, and the legislation itself does not require any assessment of the applicant's criminal guilt;[17]
- The Explanatory Report to Protocol 7 explains that the intention of article 3 was to oblige States to provide compensation only where there was an acknowledgment that the person was 'clearly innocent'. The Report does not constitute authoritative interpretation and must now be considered to have been overtaken by the Court's intervening case-law on article 6(2);[18]

---

[13] *Allen v UK* App. no. 25424/09 (12th July 2013) at [104].

[14] *Ibid.*

[15] At [126].

[16] The UK is not a signatory to Protocol 7.

[17] At [128].

[18] At [133].

- The judgments of the English courts reviewing the Secretary of State's decision to refuse compensation in *Allen* did not require the applicant to satisfy Lord Steyn's test of clear innocence in *Mullen* as the facts there were far removed.[19]
- The courts in *Allen* directed themselves to the test in s133 of whether there had been a miscarriage of justice. They did not comment on whether the evidence was indicative of the applicant's guilt or innocence. They merely acknowledged the conclusions of the quashing court, which itself was addressing the historical question whether, had the new evidence been available prior to or during the trial, there would nonetheless have been a case for the applicant to answer. They consistently repeated that it would have been for a jury to assess the new evidence, had a retrial been ordered.[20] The judgments of the courts in *Allen* did not therefore demonstrate a lack of respect for the presumption of innocence.[21]

It is clear from the reasoning of the judgement that if s133 required innocence to be proven in order to demonstrate a miscarriage of justice, this would infringe the presumption of innocence secured by article 6(2).

7. The ECtHR has since given three further decisions regarding the operation of s133 and referred back to the reasoning of the Grand Chamber in *Allen.* In *Adams v UK*[22] the Court considered:

> It is true that in the course of the Supreme Court judgment [in *Adams*] there was some reference to the question of innocence. In particular, the Justices discussed whether section 133 required that a claimant conclusively prove his innocence in order to be eligible for compensation. However, it is clear that this was roundly rejected by the majority of Justices in the case in favour of the broader test formulated by Lord Phillips. It is unfortunate that some of the language used in the judgment was liable to create confusion and an undesirable impression in the mind of the applicant as to the standard required for compensation.

Further, in *ALF v UK*[23] the ECtHR referred to the decision letter of the Secretary of State which said that post- *Adams*:

---

[19] *Ibid.*

[20] At [134].

[21] At [136].

[22] App. no. 70601/11 (12th November 2013).

[23] App. no. 5908/12 (12th November 2013).

> [I]f the new or newly discovered fact which formed the basis of the reversal of the applicant's conviction does not show beyond reasonable doubt that he was innocent of the offence of which he was convicted (which would amount to a miscarriage of justice for the purposes of the Act), compensation is payable only if that fact so undermines the evidence against him that it is beyond reasonable doubt that no conviction could possibly be based upon it.

The ECtHR observed again that the reference to innocence was unfortunate and unnecessary in light of Lord Philip's test in *Adams* and that in order to avoid both any possible misconceptions in the minds of future claimants under section 133 and any suggestion of bringing into play the presumption of innocence under article 6(2) of the Convention, it would be more prudent to avoid such language altogether in future decisions made under this section. The decisions make clear that an innocence test would infringe article 6(2).

8. The ECtHR endorsed Lord Philip's test of miscarriage in *Adams v UK* as 'clear', when the applicant appealed to Strasbourg and the Joint Committee on Human Rights in its Ninth Report of Session[24] agreed with this assessment. Lord Pannick's amendment adopts this test and we encourage peers to vote in favour of it, because it will allow deserving cases to receive compensation and will not infringe the presumption of innocence.

JUSTICE
Liberty
16 January 2014

[24] JCHR, Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill (second Report), Ninth Report of Session 2013–14 HL 108 HC 951 (6th January 2014).