JUSTICE Student Human Rights Network Conference 2015

14 March 2015

Workshop 1: Criminal Cases: redress following conviction

Relevant materials

It is often assumed that the criminal trial and appeal process affords fair and appropriate access to the justice system for victims and people accused of crime. This is not the whole story. Ensuring that the criminal justice process begins at all can be very difficult. But once the ball has started rolling, ensuring its processes are indeed fair and the right outcome is reached can be a long and arduous road that continues long after the trial has finished. Irrespective of the final verdict, the outcome may not provide sufficient redress for those who have faced the justice system, as victims or accused.

This handout provides materials to consider three post-courtroom processes established to provide additional redress for those who have been engaged in the criminal justice system: the Criminal Injuries Compensation Authority, Criminal Cases Review Commission and Miscarriages of Justice Applications Service.

It should be used in conjunction with the presentation slides and aid discussion during the workshop session.

Article 6 European Convention on Human Rights - Right to Fair Trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Extending Article 6 past courtroom?

Application in appeal proceedings – doesn't guarantee right of appeal, but where there is one will be treated as an extension of the trial process and subject to the procedural safeguards required by article 6 ECHR: *Delcourt v Belgium* (1970) EHRR 422.

The requirement for fairness will not necessarily generate the same rights as those available at trial, it will depend on the circumstances and the system of appeal engaged.

Criminal Injuries Compensation Scheme

The Criminal Injuries Compensation Authority (CICA sometimes known as the CICB) is a Public Body which administers the Criminal Injuries Compensation Scheme throughout England, Scotland and Wales.

The Criminal Injuries Compensation Scheme was set up in 1964 to compensate blameless victims of violent crime. Before 1996 awards were set according to what the victim would have received in a successful civil action against the offender. Since April 1996, the level of compensation has been determined according to a tariff set by Parliament. Following the enactment of the Criminal Injuries Compensation Act 1995, CICA was established to administer a tariffbased compensation scheme in England, Scotland and Wales. Since 1996 the tariff Scheme has been revised three times, with the latest revisions having been approved by Parliament in November 2012.[1]

It currently handles up to 40,000 applications for compensation each year, paying out up to £200 million to victims of violent crime.[2]

It has been amended on a number of occasions over its history. The most recent consultation under the current Government in 2012 aimed to reduce its budget by £50m.[3]The Justice Secretary in introducing the reform proposals considered that,

> Too often, the process of justice itself can add to the injury inflicted on the victim. They are sometimes left feeling like mere accessories to the system, kept in the dark about the progress of their case, or expected to sit next to the families of perpetrators in court. If something goes wrong in the criminal justice system, victims have to choose between 13 different agencies to decide where to complain to.

[1] Annual Report 2013-2014
[2] https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority/about
[3] Ministry of Justice, *Getting it Right for Victims and Witnesses,* Consultation Paper CP3/2012 (January, 2012)

> Equally troubling, the official Government fund, the Criminal Injuries Compensation Scheme (CICS) has never been properly funded since it began, and is now in serious financial difficulty. Claimants wait months – and in some cases years – for the whole process to run its course and payments to arrive. Meanwhile, a significant proportion of the budget is spent on payments for those who suffer relatively minor injuries, such as a sprained ankle. Absurdly, tens of millions of pounds have been spent on compensation for people who are themselves convicted criminals.[4]

The Consultation papers asserts that the main purpose of the Scheme is to provide payments to those who suffer serious physical or mental injury as the direct result of deliberate violent crime, including sexual offences, of which they are the innocent victim. This principle underpinned the recent reforms.The Criminal Injuries Compensation Scheme 2012 now governs payments, pursuant to Criminal Injuries Compensation Act 1995.[5] A guide to receiving compensation is available on the Government website.[6] The Scheme operates on principles similar to those followed in personal injury claims with primary and secondary victims and physical and mental injuries. The significant changes are to exclude minor injuries, private health care payments and anyone who has an unspent conviction resulting in a custodial or community sentence from scope, and reduce awards for the least serious injuries that remain.

Eligibility: injuries for which an award may be made

4. A person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place. The meaning of "crime of violence" is explained in Annex B.

5. (1) A person may be eligible for an award if they sustain a criminal injury which is directly attributable to their taking an exceptional and justified risk for the purpose, in a relevant place, of:

(a) apprehending an offender or suspected offender;

(b) preventing a crime;

(c) containing or remedying the consequences of a crime; or

(d) assisting a constable who is acting for one or more of the purposes described in paragraphs (a) to (c).

(2) A risk taken for any purpose described in sub-paragraph (1) in the course of a person's work will not be considered to be exceptional if it would normally be expected of them in the course of that work.

6. A person may be eligible for an award if they sustain a criminal injury in a relevant place which is directly attributable to being present at and witnessing an incident, or the immediate aftermath of an incident, as a result of which a loved one sustained a criminal injury in circumstances falling within paragraph 4 or 5. For these purposes a "loved one" is a person with whom the applicant:

(a) at the time of the incident had a close relationship of love and affection; and

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[4] *Ibid,* p3

[5] Paragraph references are to the following document: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf

[6] https://www.gov.uk/criminal-injuries-compensation-a-guide

(b) if the loved one is alive at the date of the application, continues to have such a relationship.

7. An award may be made in accordance with paragraphs 57 to 84 where a person who has sustained an injury in circumstances falling within paragraph 4 or 5 subsequently dies.

Crime of Violence – Annex B

2. (1) Subject to paragraph 3, a "crime of violence" is a crime which involves: (a) a physical attack; (b) any other act or omission of a violent nature which causes physical injury to a person; (c) a threat against a person, causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear; (d) a sexual assault to which a person did not in fact consent; or (e) arson or fire-raising. (2) An act or omission under sub-paragraph (1) will not constitute a crime of violence unless it is done either intentionally or recklessly.

3. In exceptional cases, an act may be treated as a crime of violence where the assailant:

(a) is not capable of forming the necessary mental element due to insanity; or

(b) is a child below the age of criminal responsibility who in fact understood the consequences of their actions.

Scope

Criminal injury sustained on or after 1 August 1964. Not before 1 October 1979 if, at the time of the incident giving rise to that injury, the applicant and the assailant were living together as members of the same family. Not before 1 October 1979 if at the time of the incident giving rise to the injury, the applicant and the assailant were adults living together as members of the same family, unless the applicant and the assailant no longer live together and are unlikely to do so again.

Exclusions

Grounds for withholding or reducing an award

22. An award under this Scheme will be withheld unless the incident giving rise to the criminal injury has been reported to the police as soon as reasonably practicable. In deciding whether this requirement is met, particular account will be taken of:

(a) the age and capacity of the applicant at the date of the incident; and

(b) whether the effect of the incident on the applicant was such that it could not reasonably have been reported earlier.

23. An award will be withheld unless the applicant has cooperated as far as reasonably practicable in bringing the assailant to justice.

24. An award may be withheld or reduced where the applicant fails to take all reasonable steps to assist a claims officer or other body or person in relation to consideration of their application. Such failure includes repeated failure to respond to communications sent to the address given by the applicant.

25. An award may be withheld or reduced where the conduct of the applicant before, during or after the incident giving rise to the criminal injury makes it inappropriate to make an award or a full award. For this purpose, conduct does not include intoxication through alcohol or

drugs to the extent that such intoxication made the applicant more vulnerable to becoming a victim of a crime of violence.

26. Annex D sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions.

27. An award may be withheld or reduced because the applicant's character, other than in relation to an unspent conviction referred to in paragraph 3 or 4 of Annex D, makes it inappropriate to make an award or a full award.

28. In addition to paragraphs 22 to 27, an award made in respect of a fatal criminal injury may be withheld or reduced if:

(a) the deceased's conduct before, during or after the incident giving rise to their death, makes it inappropriate to make an award or a full award. Conduct does not include the deceased's intoxication through alcohol or drugs to the extent that it made the deceased more vulnerable to becoming a victim of a crime of violence; or

(b) for exceptional reasons, the deceased's character on the date of their death, whether due to their unspent convictions or otherwise, makes it inappropriate to make an award or a full award.

Types of payment

30. The types of payment which may be made under this Scheme are:

(a) Injury payments (paragraphs 32 to 41); - tariffs are set out in Annex E

(b) Loss of earnings payments (paragraphs 42 to 49);

(c) Special expenses payments (paragraphs 50 to 56);

(d) Bereavement payments (paragraphs 61 and 62);

(e) Child's payments (paragraphs 63 to 66);

(f) Dependency payments (paragraphs 67 to 74);

(g) Funeral payments (paragraphs 75 to 77);

(h) Certain other payments in fatal cases (paragraphs 78 to 84).

31. The maximum award which may be made under this Scheme to a person sustaining one or more criminal injuries directly attributable to an incident, before any reduction under paragraphs 24 to 28, is £500,000.

For multiple injuries, payments are reduced by 30% for second highest award and 15% for third or more.

Effect of other payments on an award

85. (1) An award under this Scheme will be withheld or reduced if in respect of the criminal injury to which the award relates the applicant, whether in any part of the United Kingdom or elsewhere:

(a) receives or is awarded criminal injuries compensation or a similar payment;

(b) receives an order for damages from a civil court;

(c) agrees the settlement of a damages claim; or

(d) receives a compensation order or offer made during criminal proceedings.

(2) An award will be reduced by the amount of any payments listed in subparagraph (1), net of any benefits recoverable under the Social Security (Recovery of Benefits) Act 1997 or equivalent legislation (whether in any part of the United Kingdom or elsewhere).

If an injury is not severe enough to qualify under the Scheme but the person is still unable to work, they can apply to the Hardship Fund, which can pay out up to a maximum of £306.61, equivalent to four weeks Statutory Sick Pay, to low paid workers who are off work for more than seven days. The application must be made to Victim Support.

Applications

86. An application for an award will be determined by a claims officer in the Authority in accordance with this Scheme. Must be sent within two years of incident.Supported by evidence.

Determination and payment

An applicant may seek a review of the decision within 56 days. They may be required to make a re-payment where evidence comes to light that they have not cooperated or have misled CICA in the application made.

Review

117. An applicant may seek a review of:

(a) a decision as to the determination of an award or its amount, including on re-opening under paragraph 114;

(b) a decision under paragraph 103 to withdraw a determination;

(c) a final decision notified under paragraph 113 on reconsideration of an award;

(d) a final decision notified under paragraph 113 to require repayment or partial repayment of an award;

(e) a decision not to extend a time limit under paragraph 89, 102 or 120;

(f) a decision in respect of medical evidence under paragraph 94(a) or a deduction under paragraph 96; and

(g) a decision not to re-open an application under paragraph 114.

Must be made within 56 days of the decision.

Appeal

125. An applicant who is dissatisfied with a decision on a review, or a determination on re-opening under paragraph 124, may appeal to the First Tier Tribunal against that decision or determination in accordance with the rules of the Tribunal.

Victim Support can help with the application process.

Criminal Cases Review Commission

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. 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.

The requirement for the Commission[7]

The need for effective redress for victims of miscarriages of justice has been pursued by JUSTICE from its very inception 50 years ago. Two committees of JUSTICE which reported as long ago as 1964[8] and 1968[9] highlighted the many practical difficulties faced by petitioners seeking review of wrongful convictions and the lack of any adequate machinery for dealing with miscarriages of justice.

Responsibility for review of miscarriages formerly lay with the Home Secretary who, under the terms of the Criminal Appeal Act 1968, had power to refer alleged cases of miscarriage to the Court of Appeal if he 'thought fit' to do so.[10] A small unit of the Home Office named C3 was responsible for investigating miscarriage cases. Referrals of suspected miscarriages ran at an average of some 10 per year in the years preceding the establishment of the Commission. In general, the Home Office refused to take a proactive stance in investigating allegations of miscarriage and referred cases only when served with clear-cut evidence of miscarriage. It was left to under-resourced voluntary bodies, drawing on the pro bono efforts of lawyers, and supported by a small number of broadcasters and journalists, to bring miscarriages to light. JUSTICE was at the forefront of these activities, dealing with some 200-300 applications to review allegations of miscarriage in each year, most from serving prisoners.

The campaign for an effective and independent machinery for review of miscarriages achieved increasing prominence in the 1980s, at a time when there was rising awareness of the inadequacies and the hazards of the criminal prosecution process and when many of the most important procedural safeguards now available to defendants did not exist. In particular:

- There was no requirement for recording of police interviews before the Police and Criminal Evidence Act 1984 (henceforth PACE) came into force on 1 January 1986. Great numbers of convictions were based upon police evidence that the prisoner had confessed to the crime, with no proper safeguards against the 'verballing' of defendants by police officers.
- The rights of defendants to legal advice in the police station, and of young and vulnerable defendants to the support of an 'appropriate adult', were sketchy and unclear until the coming into effect of PACE.

[7] Extract from *L. Elks, Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (JUSTICE, 2008), pp 11-14
[8] *Criminal Appeals* (Stevens) 1964.
[9] *Home Office Reviews of Criminal Convictions*, Stevens and Sons, 1968.
[10] S17 Criminal Appeal Act 1968.

- The prosecution had scant obligations to disclose material capable of undermining its case.[11] This situation did not change significantly until the *Judith Ward* case,[12] decided in 1992.

In addition to the want of such basic procedural safeguards, there was formerly a much poorer appreciation of the flaws that might exist in an apparently watertight prosecution case. By way of example, it was only in the 1970s, following the case of *Turnbull*,[13] that the courts adopted the practice of warning juries of the possibility of mistaken identification evidence, particularly in 'fleeting glance' situations. Similarly, it was little appreciated until the case of *Confait*[14]that it was possible that completely innocent defendants could have confessed to crimes with which they had no connection. And it was only when the work of Professors MacKeith and Gudjonsson became known in the 1980s that there was any appreciation of the fact that there were some vulnerable suspects who would be particularly susceptible to confessing to crimes put to them by police officers. These matters were all of concern to JUSTICE in the years leading up to the establishment of the Commission. They have all now been resolved, in the sense that in modern trials juries would normally be exposed to the uncertainties that exist in the evidence before reaching their verdicts.

Other matters cited by JUSTICEin its early reports have a more familiar and contemporary ring. A report entitled *Miscarriages of Justice,* prepared by a committee chaired by a retired Court of Appeal judge, Sir George Waller, was published in 1989. It referred to inadequate pre-trial preparation by solicitors, and inadequate preparation by trial counsel due to late returned briefs, as important causes of miscarriage of justice. These are issues that continue to arise in criminal trials and, indeed, they have been exacerbated by the progressive strangulation of criminal legal aid by successive governments.

It is interesting to note the 'top 5' causes of miscarriages of justice noted by the Waller Committee:

(a) wrongful identification
(b) false confession
(c) perjury by a co-accused or other witness
(d) police misconduct, usually in the allegation of a 'verbal confession' which, it is claimed, was never made, or the planting of incriminating evidence
(e) bad trial tactics.

The establishment of the Commission

It is unlikely that these hardy perennial issues would have led to reform had the criminal justice system not been assailed by a series of catastrophic wrongful convictions in the 1970s, many of them related to terrorist crimes. These cases illustrate the fact (unchanged to this day) that crimes which create the greatest public outrage are particularly susceptible to giving rise to miscarriages because of the extreme pressure upon police to identify the

[11] Guidelines on the prosecution's duties of disclosure issued by the Attorney General in December 1981, ([1982] 1 All ER 734), were regarded as the most authoritative description of the prosecution's obligations prior to the *Judith Ward* case.
[12] [1993] 1 WLR 619
[13] [1976] 63 Cr App R 132
[14]R v Lattimore and ors(1976) 62 Cr.App.R. 53. In the Confaitcase, three young men were convicted in 1972 of murder and arson on the basis of their uncorroborated confessions. Their convictions were subsequently quashed by the Court of Appeal in 1975 following a public campaign on their behalf. They had originally been refused leave to appeal. The subsequent inquiry into the case, conducted by Sir Henry Fisher, criticised the police but concluded that the three men probably committed the crimes. Three years later, as a result of further new evidence, the Attorney General repudiated the Inquiry's findings and declared the men innocent.

culprits. The defects of these convictions were gradually unravelled over the succeeding years with revelations of false police testimony about 'contemporaneous' confessions, re-writing of documents, non-disclosure and unreliable scientific forensic evidence. High profile convictions subsequently quashed over the period 1989 to 1992 included those of the *Guildford Four*,[15]*the Maguire Seven*[16] and the *Birmingham Six*,[17] each involving allegations of responsibility for terrorist offences and each supported by confessions secured by illegitimate and/or violent police tactics.

The concern raised by such cases was magnified by the intransigence of the Court of Appeal in recognising the dangers of wrongful convictions. This was particularly apparent in the second appeal of the Birmingham Six, decided in 1988 following reference by the Home Secretary. Giving judgment upholding the convictions, Lord Justice Lane famously remarked (in the face of compelling evidence of an unsafe conviction) that 'the longer this case has gone on, the more convinced this court has become that the verdict of the jury …was correct'. It was directly following the quashing of the convictions of the Birmingham Six in 1990, after a further reference by the Home Secretary, that the government announced the establishment of the Royal Commission on Criminal Justice under the chairmanship of Lord Runciman, with the reform of the arrangements for the review of miscarriages of justice at the centre of its terms of reference.

Runciman – as widely anticipated – recommended that responsibility for review of allegations of miscarriages of justice should pass to an independent body, referred to as the 'Criminal Cases Review Authority'. The rationale for this independent authority is set out with great brevity and clarity in the Report of the Runciman Commission,[18] the great majority of whose recommendations were subsequently given legislative effect.

The Criminal Cases Review Commission (CCRC) is an independent public body that was set up in March 1997 by the Criminal Appeal Act 1995. its purpose is to review possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refer appropriate cases to the appeal courts.The Commission is based in Birmingham and has about 90 staff, including a core of about 50 caseworkers, supported by administrative staff.

There are eleven Commissioners, appointed in accordance with the Office for the Commissioner for Public Appointments' Code of Practice. They work with the Senior Management Team to ensure the Commission runs efficiently.

The Commission is independent and impartial and does not represent the prosecution or the defence.[19]

Our vision

To enhance public confidence in the criminal justice system, to give hope and bring justice to those wrongly convicted, and based on our experience to contribute to reform and improvements in the law

Our values

- Independence
- Integrity
- Impartiality
- Professionalism

[15]*R v Richardson &Ors*, The Times, 20.10.89
[16]*R v Maguire &Ors*(1992) 94 Cr.App.R. 133
[17]*R v McIlkenny&Ors*(1991) 93 Cr.App.R. 287
[18]Report of the Royal Commission on Criminal Justice 1993 Cm. 2263.
[19] See https://www.justice.gov.uk/about/criminal-cases-review-commission

- Accountability
- Transparency

Our aims

- To investigate cases as quickly as possible and with thoroughness and care
- To work constructively with our stakeholders and to the highest standards of quality
- To treat applicants, and anyone affected by our work, with courtesy, respect and consideration
- To promote public understanding of the Commission's role

Case Statistics - Figures to 30 November 2014

Total applications*:	18627
Cases waiting:	688
Cases under review:	744
Completed:	17183 (incl. ineligible), 568 referrals
Heard by Court of Appeal:	543 (374 quashed, 153 upheld)

*Total applications includes 279 cases transferred from the Home Office when the Commission was set up in 1997.

The critical statutory provisions governing the powers and duties of the CCRC in relation to conviction on indictment are:

i. No case will be considered unless the applicant has exhausted his rights of appeal (S.13(1)(c) Criminal Appeal Act 1995);
ii. The test for referring a case to the Court of Appeal is whether there is a real possibility that the conviction would not be upheld were the reference to be made (S.13 (1)(a));
iii. Absent exceptional circumstances the reference may only be made on the basis of evidence or argument, which had not been raised in the proceedings, which led to it or any previous appeal (S.13(1)(b) and (2));
iv. A power to require the production of documents from a "person serving in a public body" (S.17);[20]
v. A power to require the appointment of an investigating officer to carry out inquiries (S.19);
vi. An obligation to have regard to any application or representations made to the Commission by or on behalf of the person to whom it relates (S.14(2)(a));
vii. Where the CCRC rejects an application, an obligation to provide the applicant with its statement of reasons for the rejection (S.14(6)).

The condition that a referral may only be based on new evidence or argument means in practice that many applications to the CCRC are based on fresh evidence or on an invitation to the CCRC to consider obtaining fresh evidence. The 'real possibility' test involves a

[20] As a matter of broad principle no documents or material will be requested from a public body unless it appears that it may assist the CCRC in determining whether or not a case should be referred to an appellate court. The fact that material held by a public body relates directly or indirectly to a case under review by the CCRC or to a case being investigated for the Court of Appeal by the CCRC will generally satisfy the requirement of reasonableness, CCRC "Formal Memorandum: The Commission's power to obtain material from public bodies under S.17 of the Criminal Appeal Act 1995", p.2.

difficult exercise of judgment based on a predictive assessment of the outcome of an appeal were it to be referred. In a fresh evidence case that in turn requires the CCRC to consider how the court may exercise its power under s.23 CAA 1968. Debate about the exercise by the CCRC of its powers has often focussed on how it interprets the "real possibility" test and whether this has led to an over-cautious approach.

The operation of the CCRC was considered in the Ministry of Justice Triennial Review of the CCRC in 2013.[21] The Justice Committee of the House of Commons is currently carrying out an inquiry into the Commission's work.[22]

Compensation for Miscarriage of Justice

Until 2006 an *ex gratia* compensation scheme existed in conjunction with section 133 Criminal Justice Act 1988 which provides for the payment of compensation to a person whose conviction has been reversed, or they have been pardoned, owing to the discovery of new evidence, which shows beyond reasonable doubt that there has been a miscarriage of justice. The duty falls upon the Secretary of State to pay such compensation. In 2006 the *ex gratia* scheme was abolished and s133 is now the only means by which a person who has suffered a miscarriage of justice can obtain financial redress from the State.

Test for compensation

The test for compensation was recently amended by the Anti-Social Behaviour, Crime and Policing Act 2014. Section 133 CJA 1988 (as amended with the insertion of (1ZA)) provides:

> (1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.
>
> (1ZA) For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales or, in a case where subsection (6H) applies, Northern Ireland, if and only if the **new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence** (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly). (emphasis added)

In JUSTICE's view 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 section 133.[23] Restricting compensation under section 133 to cases where the applicant can demonstrate his innocence (which is what in our view the test now requires) is unduly narrow, and does not provide adequate redress in cases where the criminal justice system has gone seriously wrong.

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[21] https://www.justice.gov.uk/downloads/about/criminal-cases-review/ccrc-triennial-review.pdf

[22] See http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/criminal-cases-review-commission/

[23] The cases of the Birmingham Six, the Guildford Four, The Maguire Seven, The Cardiff Three and Judith Ward would be unlikely to satisfy the new test.

Justification was set out during the Parliamentary process by Lord McNally, Minister of State in Ministry of Justice:

> "Clause 151 [now s175 Anti-Social Behaviour, Crime and Policing Act 2014, in force March 13 2014] provides, for the first time, a statutory definition of what constitutes a "miscarriage of justice" for the purpose of determining eligibility for compensation under Section 133 of the Criminal Justice Act 1988. This definition will mean that compensation is paid only where the new fact that led to the quashing of the applicant's conviction shows beyond reasonable doubt that they were innocent of the crime of which they were convicted.
>
> …In the Government's view, a miscarriage of justice will have taken place only when someone should not have been convicted—not just because something went wrong with the trial process or with the investigation, either of which could render a conviction unsafe, but because there was a fact, unknown at the time of their conviction, that clearly demonstrates that they did not commit the crime.
>
> We agree that people should not have to prove their innocence in order to qualify for compensation. We also agree that to require this would be equivalent to reversing the burden of proof. That is why we are not requiring it. We do not, and do not plan to, require applicants for compensation to prove anything. We do not wish them to provide us with new evidence relating to their case. We look only at the new fact that led the Court of Appeal to quash their conviction and at the impact of that new fact. If the new fact shows that they were innocent—for example, that they were somewhere else when the offence was committed—then they have been the victim of a miscarriage of justice and should, and will, be compensated."[24]

The UK Supreme Court considered the test for a 'miscarriage of justice' in *R v Adams.*[25]Until this point there had been a lack of clarity as the test was not defined in the legislation. JUSTICE intervened in that case to ask the court to find that Lord Bingham's formulation in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 at [4] is correct. Lord Bingham stated in *Mullen* that 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.'

The Supreme Court in *Adams* did not go as far as this, but decided that the test should be:

> 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.[26]

In coming to this conclusion, Lord Philips considered a test that requires innocence,

> …will 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 doubt. This is a heavy price to pay for ensuring that no guilty person is ever the recipient of compensation.[27]

[24]Hansard HL Deb, 12 November 2013, Col 703.
[25][2011] UKSC 18.
[26]*Ibid.* at [55].
[27]At [50].

A test of innocence will be impossible for many to satisfy. As Lady Hale observed in *Adams,* the Court's favoured test, as opposed to one requiring innocence,

> [I]s the more consistent with the fundamental principles upon which our criminal law has been based for centuries. Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt… He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now.[28]

Section 133 gives effect, almost verbatim, to section 14(6) of the International Covenant on Civil and Political Rights 1966. Nothing in the Covenant itself, or in the *travauxpréparatoires*, demonstrates a consensus among the States Parties that compensation should be paid only to the innocent. As Lord Bingham noted in *Mullen*, '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.'[29] To that extent, an amendment to limit compensation to the factually innocent could breach the UK's international obligations to give effect to the ICCPR.

It is also arguable that s133 as now drafted will infringe article 6(2) ECHR (which provides for the presumption of innocence). The European Court of Human Rights has applied the presumption of innocence to a variety of scenarios following acquittal and concluded that the right under article 6(2) is engaged and will be violated where a statement or decision reflects an opinion that the person is guilty, unless he has been proved so according to law.[30] In July the ECtHR ruled in *Allen v UK*[31]that the UK compensation scheme does not violate article 6 ECHR. However, it made this ruling expressly on the basis that the current regime does not require an applicant to demonstrate their innocence.[32]If compensation is not awarded following the quashing of a conviction because the Secretary of State is not satisfied of the applicant's innocence, this,in JUSTICE's view, will be a clear interference with the presumption of innocence that the person is entitled to.

Application

People are released from prison following a conviction being quashed (usually appearing in Court via videolink) with a travel warrant and £46. There is no requirement to provide any other support until a determination as to compensation is made.

The application process for compensation therefore requires a person to apply online where their conviction has been quashed following an out of time appeal.

They must satisfy the Secretary of State for Justice that new evidence shows they did not commit the offence. The main evidence will come from the CACD judgment quashing the conviction. There may be little assistance from the Court of Appeal since it does not make a finding of innocence on quashing a conviction[33] and in no other than the clearest cases will the judgment reveal actual innocence.

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[28]At [116].
[29]Supra at [9(2)].
[30]*Hussain v United Kingdom* (2006) 43 EHRR 22 (concerning a decision on costs following acquittal); *Lamanna v Austria* (App no. 28923/95, 10 July 2001) (concerning compensation for detention on remand).
[31]Application no.25424/09, 12th July 2013.
[32]At [133].
[33]In the Birmingham Six case, R v McIlkenny and others [1992] 2 All ER 417, the Court of Appeal held: 'Nothing in s.2 of the 1968 Act or anywhere else obliges or entitles usto say whether we think that the appellant is

Application must be made within two years of the decision quashing the conviction, unless there are exceptional circumstances.

If the Secretary of State determines there is a right to compensation, the award amount is determined by an Independent Assessor in accordance with s133A:

> (2) In assessing so much of any compensation payable under section 133 as is attributable to suffering, harm to reputation or similar damage, the assessor must have regard in particular to—
> (a) the seriousness of the offence of which the person was convicted and the severity of the punishment suffered as a result of the conviction, and
> (b) the conduct of the investigation and prosecution of the offence.
>
> (3) The assessor may make from the total amount of compensation that the assessor would otherwise have assessed as payable under section 133 any deduction or deductions that the assessor considers appropriate by reason of either or both of the following—
> (a) any conduct of the person appearing to the assessor to have directly or indirectly caused, or contributed to, the conviction concerned; and
> (b) any other convictions of the person and any punishment suffered as a result of them.
>
> (4) If, having had regard to any matters falling within subsection (3)(a) or (b), the assessor considers that there are exceptional circumstances which justify doing so, the assessor may determine that the amount of compensation payable under section 133 is to be a nominal amount only.
>
> (5) The total amount of compensation payable to or in respect of a person under section 133 for a particular miscarriage of justice must not exceed the overall compensation limit. That limit is—
> (a) £1 million in a case to which section 133B applies [detention of more than ten years in connection with the relevant offence, either serving sentence or remanded in custody], and
> (b) £500,000 in any other case.
>
> (6) The total amount of compensation payable under section 133 for a person's loss of earnings or earnings capacity in respect of any one year must not exceed the earnings compensation limit.
>
> That limit is an amount equal to 1.5 times the median annual gross earnings according to the latest figures published by the Office of National Statistics at the time of the assessment.[34]

If the Secretary of State determines that there is no right to compensation, this decision is amenable to judicial review. The decision of the Independent Assessor is not published and cannot be appealed.

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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' at [424-5].

[34] Which at end 2013 were £27,000, http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2013-provisional-results/stb-ashe-statistical-bulletin-2013.html

Compensation is not simply recognition of punishment wrongly suffered. It 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).

Two recently released men, Victor Nealon and Sam Hallam, have sought compensation and been refused.The circumstances of their release would likely have satisfied the old test. They are now challenging those decisions by way of judicial review.[35]

JODIE BLACKSTOCK

JUSTICE

14 March 2015

[35] http://thejusticegap.com/2014/06/innocent-enough-moj-refuse-victor-nealon-compensation-17-wasted-years/ and http://www.independent.co.uk/news/uk/home-news/wrongly-convicted-men-launch-new-case-against-the-justice-secretary-9985773.html