IN THE EUROPEAN COURT OF HUMAN RIGHTS

App. Nos. 32483/19 and 35049/19

VICTOR NEALON

Appellant

and

SAM HALLAM

Appellant

and

UNITED KINGDOM

Respondent

WRITTEN SUBMISSIONS OF THE INTERVENER

Introduction

1. Founded in 1957, JUSTICE is an all-party law reform and human rights non-governmental organisation based in the UK. It is a registered charity and the British section of the International Commission of Jurists.[1]

2. The Court granted leave to JUSTICE to intervene in the instant case on 3 February 2021 and these submissions are respectfully submitted to address the three areas on which it proposed that it could assist the Court:

    A. The development of the presumption of innocence to protect applicants seeking support from compensation schemes in similarly placed international instruments and common law jurisdictions;

    B. The approaches taken by other Contracting Parties to the provision of compensation, in light of this Court's careful guidance to ensure schemes do not violate the presumption of innocence; and

    C. The impact upon people whose convictions have been quashed of compensation schemes that undermine their status as innocent in law.

3. The facts and issues set out in the applications of the Appellants pertain to whether section 133 of the Criminal Justice Act 1988 ("CJA"), as amended in 2014, is compatible with the presumption of innocence protected by Article 6(2) ECHR. For the avoidance of doubt, JUSTICE agrees with the dissenting judgments of Lords Reed and Kerr in the UK Supreme Court judgment in this case[2] that the Strasbourg case law provides a clear and constant line of jurisprudence on the assessment of whether a compensation scheme is compatible with the presumption of innocence. JUSTICE

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[1] JUSTICE thanks Gibson, Dunn & Crutcher LLP and members of the Fair Trials' Legal Experts Advisory Panel for their research contributions to this submission.

[2] *R (on the application of Hallam and Nealon) v Sec. State for Justice* [2019] UKSC 2, at [174] and [205] respectively.

submits that the Grand Chamber in *Allen v UK* App. No. 25424/09 (judgment of 12 July 2013) was categorical in demonstrating that a statutory scheme requiring an applicant to prove factual innocence by way of a new or newly discovered fact is not compatible with the presumption of innocence. This is important because "*the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected*" (*Allen* at [103]) and compensation schemes which "*cast doubt on the correctness of the acquittal*" or otherwise "*fail to dispel the suspicion of criminal guilt*" will infringe the presumption of innocence to which the person is entitled (*Allen* at [126]). In our submission – in law and from the perspective of the individual concerned and the lay public - it is axiomatic that a scheme which requires an applicant to demonstrate beyond reasonable doubt that they did not commit the offence fails to dispel the suspicion of criminal guilt.

4. Prior to the introduction of s. 133 CJA, *ex gratia* payments were the sole way of compensating victims of miscarriage of justice in the UK. In a written answer to Parliament 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.*[3]

5. The purpose of compensation in this context is undoubtedly to address the wrongful conviction of those who are innocent of the crime of which they were charged. As Lord Kerr observed at [203] in *Hallam* below:

> *"The opportunity to proclaim one's innocence and the right to benefit from the recognition and acceptance of that condition lies at the heart of much of the dispute in this case and much of the case law of the Strasbourg court on the subject. But an inevitable sub-text is that establishing innocence as a positive fact can be an impossible task. This is especially so if conventional court proceedings do not provide the occasion to address, much less resolve, the issue."*

6. The eligibility test establishing the right to compensation must therefore be carefully drawn, so as not to require the applicant to prove more than the criminal justice process requires, nor offend the presumption of innocence.

A. The development of the presumption of innocence to protect applicants seeking support from compensation schemes in similarly placed international instruments

International Covenant on Civil and Political Rights

7. The right to compensation for miscarriage of justice is derived from Article 14(6) of the International Covenant on Civil and Political Rights ("ICCPR"), which provides:

> *"When a person has by a final decision 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 conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that*

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

the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

8. Many signatories to the ICCPR formulate a right to compensation, which is very close to the requirement set out in Article 14(6), not least the UK by way of section 133 CJA. The ICCPR also contains the right in Article 9(5) that: "*Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."* This right is not afforded in the UK, save by way of civil suit at common law, but is provided by a number of Contracting Parties to the ECHR considered below.

9. Article 14(2) ICCPR reflects the exact wording of Article 6(2) ECHR, namely: "*Everyone charged with a criminal offence shall [have the right to] be presumed innocent until proved guilty according to law."* The interpretation of Article 14(6) in light of the obligations contained in Article 14(2) by the UN Human Rights Committee ("the Committee") is therefore of relevance.

10. In 1992, in the case of *W.J.H. v. the Netherlands* the Committee considered that Article 14(2) ICCPR applies only to criminal proceedings and not to proceedings for compensation.[4] However, in 2010 the Committee was again asked in *Dumont v Canada*[5] whether a requirement to prove factual innocence in order to be awarded compensation was a violation of the presumption of innocence. On this occasion the Committee declined to say that Article 14(2) did *not* apply to compensation proceedings. It found that the Canadian procedure - in requiring the applicant to prove factual innocence himself, rather than the State setting up an investigative process - deprived the applicant of an effective remedy in order to obtain compensation: a violation of article 2(3) ICCPR in conjunction with Article 14(6). At [23.5] it decided this *without prejudice* to whether the State party's interpretation of Article 14(6) violated the presumption of innocence. Moreover, the partially dissenting opinion of Mr. Fabián Omar Salvioli concludes that Article 14(6) clearly imposes no requirement upon an applicant to prove a miscarriage of justice has occurred, never mind their factual innocence: [4-5]. He goes on to state:

> *"According to a rule of both customary and conventional international law, a party may not invoke the provisions of its own domestic law as justification for not applying a provision of international law; this rule entails a general obligation not only to align domestic law with the provisions of the international instrument concerned, but also not to enact legislation which is incompatible with that instrument."*

11. In 2015 the Committee provided concluding observations on the seventh periodic review of the UK's compliance with the ICCPR. It considered the new definition of "miscarriage of justice" inserted by section 133(1ZA) of the Criminal Justice Act 1988 in 2014. The Committee noted its concern that the new test *"may not be in compliance with article 14(6) of the Covenant*" and called on the UK to "*review the new test for miscarriage of justice with a view to ensuring its compatibility with article 14(6) of the Covenant."*[6]

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[4] U.N. Doc. CCPR/C/45/D/408/1990 (1992), at [6.2].

[5] U.N. Doc. CCPR/C/90/D/1467/2006 (2010).

[6] Human Rights Committee, '*Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*' (2015). There is no further expansion on why the Committee raised this concern. However, in light of the decision in *Dumont*, and given the nature

12. As such, while the Committee has not yet expressly held that Article 14(6) must be read in accordance with Article 14(2), its reasoning has developed to suggest that this might be a possibility in a future case.

13. In terms of other regional treaties, while these do include a similar provision on compensation for miscarriage of justice,[7] regional courts or bodies, to the extent that these exist, have not interpreted it.

Similarly placed common law jurisdictions

14. The two closest jurisdictions to England, Wales and Northern Ireland, which are also signatories to the ECHR, are Scotland (as part of the UK) and Ireland. These nations provide the best indication of how common law jurisdictions with an equivalent jury system apply the compensation provision in a Convention compliant manner.

Scotland

15. Section 133 CJA applies in Scotland, unamended. Guidance for claimants states that "*compensation may be payable when a person has been convicted of a criminal offence and subsequently had his/her conviction reversed or where they have been pardoned on the ground that a new or newly discovered fact showed beyond reasonable doubt that there has been a miscarriage of justice*" and further, the scheme is "*not applicable to cases which have simply been successful on appeal in the ordinary course of the criminal justice process as this reflects the due process of law.*"[8]

16. As such, it is clear that a "miscarriage of justice" is accepted to occur in Scotland solely by there being fresh evidence (the new or newly discovered fact) in an out of time appeal that leads to the quashing of a conviction or a pardon. No further elaboration is required.[9]

Ireland

17. Article 14(6) is applied in Ireland pursuant to section 9 Criminal Procedure Act 1993 (the "CPA 1993"). The provision provides for compensation where (a) the Irish Court of Criminal Appeal quashes a conviction on appeal or further appeal and certifies that a newly discovered fact shows there has been a miscarriage of justice, or there is otherwise a pardon and (b) the Minister for Justice is also of the opinion that a newly discovered fact shows that there has been a miscarriage of justice.

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of the amendment, the Committee must be concerned by the additional requirement of proof of innocence.

[7] African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (pursuant to Article 7, African Charter on Human and Peoples' Rights 1986, para N(10)(c); Article 10 of the American Convention on Human Rights 1978, Article 19 Arab Charter on Human Rights 2008, which provides in terms: *Anyone whose innocence is established by a final judgment shall be entitled to compensation for the damage suffered.* The Charter is not enforceable and so has not been interpreted.

[8] Scottish Government, Miscarriage of Justice: compensation claim form (2016), pp. 3-4.

[9] Scotland has an additional *ex gratia* scheme for cases where there has been a serious error by the police or another public authority without meeting the statutory conditions, or other exceptional circumstances. Such a scheme was abolished in England, Wales and Northern Ireland in 2006.

18. The Irish Supreme Court has discouraged a definitive definition of "miscarriage of justice": *DPP v Pringle (No.2)* [1997] 2 IR 225.[10] Pursuant to the CPA 1993, the court must determine whether the newly discovered fact shows that a miscarriage of justice occurred. This is not confined to the question of actual innocence but extends in a given case to the administration of the justice system itself: *DPP v Meleady & Grogan* (No.3) [2001] 4 IR 16.[11] The Irish Supreme Court, approving previous authorities, recently observed in *DPP v Buck*[12] that the section 9 procedure is one which:

> *"[R]equires more than the quashing of a conviction or, on a retrial ordered under a miscarriage of justice application, the acquittal of the accused. A finding is required that a miscarriage of justice has occurred. This is a civil procedure where factual innocence is to be established* ***or a finding is made that the prosecution should never have been brought because there was never any credible evidence implicating the accused****."*[13]

19. The Irish Court of Criminal Appeal in *DPP v Conmey* observed that the phrase "miscarriage of justice" is defined in the Oxford English Dictionary as "a failure of the judicial system to attain the ends of justice".[14] The Court categorically stated at the heading "Miscarriage of Justice":

> *"The concept of miscarriage emphatically* ***does not involve positive proof that the applicant is factually innocent*** *of the offence. In the great majority of cases, especially cases which are more than forty years old, that would be impossible to establish."*

20. The case law in Ireland therefore aligns with the majority decision in *Adams*[15] and the dissenting judgment of Lord Kerr in *Hallam* below at [202] – [204] in recognising the practical difficulties for an acquitted person in demonstrating their innocence. Neither the courts in Scotland or Ireland have had to address the question of whether the compensation scheme is incompatible with the presumption of innocence, since the schemes operate successfully without the requirement to demonstrate factual innocence.

B. The approaches taken by other Contracting Parties to the provision of compensation, in light of this Court's careful guidance to ensure schemes do not violate the presumption of innocence

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[10] Report available if required.

[11] Report available if required.

[12] *DPP v Buck* [2020] IESC 16.

[13] These two categories were set out in (*DPP) v Shortt (No.2)* [2002] 2 IR 696), along with two further categories: (c) Where there has been such a departure from the rules which permeate all judicial procedures as to make that which happened altogether irreconcilable with judicial or constitutional procedure.

(d) Where there has been a grave defect in the administration of justice, brought about by agents of the State.

[14] *DPP v Conmey* [2014] IECCA 31.

[15] *R (Adams) v Secretary of State for Justice (JUSTICE intervening)* [2011] UKSC 18; [2012] 1 AC 48.

21. As the Court observed in *Allen,* like in Scotland, in many of the Contracting Parties *"compensation is essentially automatic following a finding of not guilty, the quashing of a conviction or the discontinuation of proceedings (for example, in Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Montenegro, Romania, the former Yugoslav Republic of Macedonia, Turkey and Ukraine)*". France[16] and Hungary[17] are further jurisdictions that have an essentially automatic process.

22. However, four Contracting Parties (Austria, Belgium, Norway and Spain) historically had statutory tests that required the applicant, to differing extents, to demonstrate their innocence in order to receive compensation. In each jurisdiction these tests have expressly been amended to remove this requirement in light of the Court's jurisprudence that 'innocence tests' are incompatible with Article 6(2) ECHR.

Austria

23. Prior to 1 January 2005 the test for compensation was set out in section 2(1)(b) of the *Criminal Law Compensation Act* 1969 (the "1969 Law"*).* It provided that a right to compensation arose where *"**the suspicion that he committed the offence has been dispelled** or prosecution is excluded on other grounds, in so far as these grounds existed when he was arrested..."*[18]

24. In S*ekanina v. Austria*, App. No. 13126/87, (judgment 25 August 1993), *Rushiti v. Austria*, App. No. 28389/95 (judgment 21 March 2000) and *Weixelbraun v. Austria*, App. No. 33730/96 (judgment 20 December 2001) the Court held that decisions made pursuant to the statutory scheme under section 2(1)(b) of the 1969 Law violated the presumption of innocence. This is because they required the voicing of suspicions of guilt about the individuals applying for compensation following their acquittal.

25. Subsequently, the Austrian Parliament amended the law.[19] Section 2(1)(2) of the Criminal Compensation Act 2005 now provides an essentially automatic test.[20] A person will be eligible for compensation if they are, "*arrested or held in custody on suspicion of a criminal offence and [are] subsequently acquitted or exempted from prosecution by a domestic criminal court*".[21]

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[16] Article 149 (Act no. 70-643 of 17 July 1970 art. 1 Official Journal of 19 July 1970 in force 1 January 1971), as amended (available in English at https://www.legal-tools.org/doc/912f4d/pdf)

[17] Article 845(4) Act XC of 2017 on the Code of Criminal Procedure (in force as of 23rd February 2021) (available in Hungarian only).

[18] Set out, for example in, *Sekanina v. Austria*, App. No. 13126/87, para 16.

[19] The Justice Committee of the National Council, 'Committee Report' 2004 (available in German only). The Committee considered: "Austrian criminal courts take this case law of the [ECtHR] into account by interpreting the applicable law in conformity with the constitution and fundamental rights…[n]evertheless, the current law also needs to be changed in order to dispel any doubts about the conformity of Austrian law with the [ECHR]. The Federal Government therefore decided in the Council of Ministers on February 1, 2002 to initiate a restructuring of this area of law in accordance with fundamental rights, taking into account modern principles of civil law."

[20] There are exclusions and limitations to compensation under sections 3 and 4 of the Criminal Compensation Act 2005 (available in German only), similar to other jurisdictions that relate to technicalities and circumstances where the applicant has mislead the authorities or withheld information.

[21] Section 2(1)(2), Criminal Compensation Act 2005 (available in German only).

Belgium

26. Prior to 30 December 2009, Article 28(1)(b) of the Law of 13 March 1973 provided that a person was entitled to compensation for pre-trial detention of more than eight days, if*: "after benefiting from an order or a judgment of dismissal,* ***it justifies elements of fact or law demonstrating its innocence****."*

27. In *Capeau v Belgium* App. No. 42914/98 (judgment 13 January 2005) the Court held that, "*[r]equiring a person to establish his or her innocence, which suggests that the court regards that person as guilty, is unreasonable and discloses an infringement of the presumption of innocence.*" The test set out in Article 28(1), therefore, violated Article 6(2) ECHR. Following this judgment the legislature repealed the specific condition to demonstrate his innocence, making the test effectively automatic.[22]

Norway

28. Prior to 10 January 2003, Article 444 of the Criminal Procedure Act of 22 May 1981 no. 25 (the "CPA 1981") required that for a person to claim compensation following acquittal or discontinuance, they had to show that it was *"****probable that he did not carry out the act that formed the basis for the charge.****"*[23]

29. On 10 January 2003 the Norwegian Government amended Article 444 of the CPA 1981 to remove this requirement and make the test effectively automatic. The Government considered that the 'innocence test' in Article 444 was compatible with Article 6(2) ECHR.[24] However, following the Court's decisions in S*ekanina* and *Rushiti* it had concerns that if the right to compensation was dependant on the grounds for dismissal or acquittal, the test may be incompatible.[25] These concerns were well founded as the Court held one month later on the 11 February 2003 in *Hammern v. Norway*, App. No. 30287/96 and *O v. Norway*, App. No. 29327/95 that Article 444 was incompatible with Article 6(2). Pointedly at [40] the Court considered the statement of the Appeals Leave Committee of the Norwegian Supreme Court that the refusal "*did not undermine or cast doubt on the earlier acquittal",* similar to the assertion of the Secretary of State in his refusal letters in this case. Nevertheless, given the conditions of the statutory test, the Court was "*not convinced that, even if presented together with such a cautionary statement, the impugned affirmations were not capable of calling into doubt the correctness of the applicant's acquittal, in a manner incompatible with the presumption of innocence."*

Spain

30. In Spain, as in Belgium, the developments in the law have concerned compensation for pre-trial detention followed by acquittal or dismissal. Prior to 19 June 2019, Article 294.1 of the Organic Law of the Judiciary read *"those who, after having been remanded in custody, are acquitted* ***due to the non-existence of the act charged*** *or*

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[22] Article 8, Law of 30 December 2009 regarding various provisions in the field of Justice (available in French only).

[23] Set out in *O v. Norway*, App. No. 29327/95 (judgment of 11 February 2003) , para 16.

[24] Norwegian Ministry of Justice and Public Security, Ot.prp. No. 77 (2001-2002): On the Act on Amendments to the Criminal Procedure Act, etc. (compensation after prosecution), 2002, chapter 5.4 (available in Norwegian only).

[25] *Ibid* chapter 7.5.1(available in Norwegian only).

who have been dismissed for the same reason, provided that they have suffered damages, shall be entitled to compensation".[26]

31. In *Puig Panella v. Spain*, App. No. 1483/02 (judgment of 25 April 2006), *Tendam v. Spain*, App. No. 25720/05 (judgment of 13 July 2010) and *Vlieeland Boddy and Marcelo Lanni,* App. Nos. 53465/11 and 9634/12 (judgment of 16 February 2016) the Court held that Article 294.1 violated Article 6(2) ECHR because the provision differentiated between the grounds on which an individual had been acquitted. The Court held that the distinction in the legislation between acquittal on the grounds of proven non-participation in the act and acquittal due to lack of proof of participation ignores the prior acquittal of the accused. After a series of domestic cases[27] applying the Court's jurisprudence, the Spanish Constitutional Court declared the wording in article 294.1 unconstitutional. [28] Article 294.1 was therefore amended to be effectively automatic: "*those who, after having been remanded in custody, are acquitted or have been ordered to be discharged shall have the right to compensation, provided that they have suffered damages."*

32. JUSTICE therefore submits that across the Contracting Parties to the Convention, including the common law jurisdictions closest to England, Wales and Northern Ireland, compensation schemes have either already been compatible with Article 6(2) ECHR, or have developed to be so in light of the Court's jurisprudence. The UK Government continues to ignore the recognition of its fellow Contracting Parties, and jurisprudence of the Court, that compensation schemes must not call into question the innocence of applicants who have had their convictions quashed or been acquitted of charges brought against them. As has been shown by each of the compensation schemes considered above, Contracting Parties - and in particular Scotland and Ireland applying Article 14(6) ICCPR directly - have established workable schemes that compensate miscarriage of justice without offending Article 6(2) ECHR.

C. The impact upon people whose convictions have been quashed of compensation schemes that undermine their status as innocent in law

33. In 2014, the House of Lords subjected the proposed amendment to section 133 CJA to significant scrutiny as it passed through Parliament. During the Report stage debate, many distinguished members of the House raised concerns that the test set out in the clause would be too difficult to satisfy and cause additional hardship to victims of miscarriage of justice. Baroness Kennedy QC (human rights barrister and President of JUSTICE) encapsulated that debate:

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[26] See *Puig Panella v. Spain*, App. No. 1483/02 (judgment of 25 April 2006), after [36].

[27] Judgment of the Constitutional Court of 19 January 2017, STC 8/2017 and the Constitutional Court of 30 January 2017, STC 10/2017, judgment of the Supreme Court of 12 July 2017, STS 2862/2017, Order of the Constitutional Court of 17 July 2018, AUTO 79/2018 (all available in Spanish only).

[28] Judgment of the Constitutional Court of 19 June 2019, STC 85/2019 of 19 June 2019 (available in Spanish only): *"Circumscribing the scope of application of art. 294 LOPJ to the objective non-existence of the act establishes an unjustified and disproportionate difference in treatment with respect to the innocent acquitted for not being perpetrators of the act, while at the same time undermining the right to the presumption of innocence by excluding the acquitted due to lack of proof of the objective existence of the act."* The provision was therefore contrary to Article 17 (right to liberty), Article 14 (equality) and Article 24.2 (presumption of innocence) of the Spanish Constitution.

> "*When a case has gone wrong and new material comes to light which changes the whole complexion of the case, and it becomes clear that a jury in possession of all the evidence would have reached a different verdict, those who have suffered should have some compensation. To expect them to prove that they were innocent beyond reasonable doubt is to add to the injustice they have already suffered. Miscarriages of justice lead to ruined lives. Families are destroyed. People often end up without partners when they come out of prison. They lose jobs and homes. The mental despair and anguish is never fully resolved. That is why they need to have such real help afterwards. People's lives never go back to how they were. This is where we find, as a decent society, that we have to make amends.*"[29]

34. In JUSTICE's report *Supporting Exonerees*[30] it drew upon evidence from a number of wrongly convicted individuals, their lawyers, support organisations, journalists, psychiatrists and academics. Their views as to what exonerees require in order to readjust successfully to everyday life are broadly similar. Exonerees are an anomaly in the justice system. A wrongful conviction can ruin a person's life. They will lose their home, their job, their income and their relationships will be placed under immense strain. The public will think that the individual is guilty, which is a mark that is hard to remove. Spending years in prison, knowing that you should not be there can cause serious psychological trauma. When released, reintegrating back into society can be yet another challenge. Without proper support, many exonerees struggle to come to terms with freedom, after years of being institutionalised. Without proper support, release can turn into a continuation of their wrongful punishment and cause long-term mental ill-health that may never mend.

35. Compensation is not a panacea, but it goes some way to providing recognition of the harm caused, funds to establish a home and access to specialist treatment and support. However, as a consequence of the amended statutory scheme, the system in England, Wales and Northern Ireland is not only very complex to navigate, but also imposes requirements that are almost impossible to satisfy.

36. The majority of the Justices in *Adams* recognised this. Lord Kerr at [172] observed:

> *"I cannot accept that the section imposes a requirement to prove innocence. In the first place, not only does such a requirement involve an exercise that is alien to our system of criminal justice, that system of justice does not provide a forum in which assertion of innocence may be advanced. An appeal against conviction heard by the Court of Appeal (Criminal Division) is statutorily required to focus on the question whether the conviction under challenge is safe. In a number of cases, evidence may emerge which conclusively demonstrates that the appellant was*

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[29] Anti-social Behaviour, Crime and Policing Bill, HL Deb Report Stage, 4th Sitting, 22 January 2014, Col 674. The Parliamentary debates indicate the uncertainty about the proposed test, concern about the impact of the test in practice and concern that it would violate the ECHR. The test was amended by the House of Lords to remove the requirement of innocence, *ibid* at Col 695 but was reinserted in the House of Commons: HC Debates, 4th February 2014 Cols 163 – 183 and then finally defeated in the Lords: HL Debates, 11th March 2014 Cols 1710 – 1723. See also Joint Committee on Human Rights that the test would not be compatible with Article 6(2) ECHR in light of *Allen:* JCHR Legislative Scrutiny, Anti-social Behaviour, Crime and Policing Bill, fourth report of session 2013-14, HL Paper 56, HC 71, pp. 43-47; JCHR Legislative Scrutiny, Anti-social Behaviour, Crime and Policing Bill (second report), ninth report of session 2013-14, HL Paper 108, HC 951, pp. 19-25.

[30] JUSTICE, *Supporting Exonerees: ensuring accessible, continuing and consistent support* (2018).

wholly innocent of the crime of which he or she was convicted but that will inevitably be incidental to the primary purpose of the appeal. The Court of Appeal has no function or power to make a pronouncement of innocence. It may observe that the effect of the material considered in the course of the appeal is demonstrative of innocence but it has no statutory function to make a finding to that effect: R v McIlkenny (1991) 93 Cr App R 287."[31]

37. Baroness Hale likewise observed at [116]:

> *"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... Otherwise he is not guilty, irrespective of whether he is in fact innocent. If it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished. 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*."

38. Lord Brennan – an assessor of compensation awards for 10 years – further explained during the House of Lords debate on the Bill:

> *"The government test involves the Minister looking for material to show innocence from proceedings that were designed to establish guilt…It is a very serious decision most pertinently determined by solid evidence, and from where is he or she to extract it in our present system? The new fact which establishes innocence or that someone did not commit the offence has to be very powerful indeed—for example, irrefutable DNA evidence or a subsequently discovered group of witnesses who prove a rock solid alibi. There are very few sets of circumstances."*[32]

39. By requiring a new or newly discovered fact to demonstrate innocence, the UK Government is demanding that the applicant overcome an additional hurdle in order to be compensated for their wrongful conviction. After many years, finally having their conviction quashed and being released from prison, it is they that must go on to prove their factual innocence. This cannot do anything other than make the applicant feel like they continue to be presumed guilty. To further accuse individuals in this way compounds the trauma that they have suffered through no fault of their own.

Conclusion

40. For the reasons set out above, JUSTICE submits that the compensation scheme in England, Wales and Northern Ireland is incompatible with Article 6(2) ECHR and is inconsistent with other Contracting Parties that have statutory compensation schemes. It further submits that to require an applicant to prove factual innocence after acquittal undermines the whole purpose of the compensation scheme. It offends their entitlement to be presumed innocent in such a way that it continues the trauma already suffered due to wrongful conviction by the State.

JODIE BLACKSTOCK
16 March 2021

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[31] The Court in *McIlkenny* at 311 in fact stated that nothing in the then s. 2 Criminal Appeal Act 1968 or anywhere else "obliges *or entitles* us to say whether we think that the appellant is innocent."

[32] HL Debates, 11th March 2014, at col 1718.