Judicial guidance on the award of compensation for miscarriages of justice: issues of accountability and compatibility with the presumption of innocence

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Introduction

The issue of when compensation should be awarded to a defendant who has been the victim of a miscarriage of justice is a difficult and controversial one. Section 133, Criminal Justice Act 1988 provides a statutory scheme for the award of compensation where there is "new or newly discovered" evidence which "shows beyond reasonable doubt that there has been a miscarriage of justice".[1] There are many possible meanings of the phrase "miscarriage of justice" and its interpretation within the context of the compensation scheme carries important policy implications, most notably in striking the right balance between being broad enough to compensate those who are factually innocent, and being sufficiently narrowly construed so as not to compensate those who are truly guilty but acquitted after an appeal on a technicality. It also raises further issues relating to executive and legislative accountability, the relationship between the legislature, the judiciary and the executive, and the protection of the presumption of innocence under article 6.2 of the European Convention on Human Rights (1950).

This article concerns three recent cases. Two of the cases were heard domestically and explored the scope of eligibility for compensation under s.133, Criminal Justice Act 1988, while a further case was heard in the European Court of Human Rights and concerned an alleged violation of the presumption of innocence under article. In *R (on the application of Adams) v Secretary of State for Justice*,[2] the Supreme Court considered the meaning of the phrase "miscarriage of justice" for the purposes of s.133. The Court took a broad approach, ruling that the award of compensation should not be limited to those who are conclusively proved to be innocent, but that a defendant was entitled to compensation where new evidence had come to light upon which no reasonable jury could properly have convicted the defendant. More recently, in the case of *R (on the application of Ali) v Secretary of State for Justice*,[3] the Divisional Court provided some guidance on the application of the decision in *Adams*.

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[1] The precise wording of s.133(1), Criminal Justice Act 1988 is: "…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".

[2] [2012] 1 AC 48

[3] [2013] WLR (D) 35

Beatson LJ held that the fundamental question in s.133 was: "in what circumstances will evidence be 'so undermined' by a new fact of facts that no conviction could be based upon that evidence"?[4] Finally, in *Allen v United Kingdom*,[5] the applicant took her case to the European Court of Human Rights, arguing that the state had violated the presumption of innocence under article 6.2 in her case because the decision to refuse her compensation under the scheme was based on reasons which gave rise to doubts about her innocence. It should be noted that this case did not involve a challenge to the compatibility of the statutory scheme with article 6.2, nor did the Court concern itself with the scope of the eligibility criteria.

This article considers the interpretation of the statutory scheme under s.133 of the Criminal Justice Act 1988 by the domestic courts, and the implications of all three of these decisions, as well as the extent to which these cases provide us with clear and rational guidance as to the award of compensation for miscarriages of justice.

Case 1: *R (on the application of Adams) v Secretary of State for Justice* [2012] 1 AC 48

The case of *Adams* centred on the interpretation of the powers of the Secretary of State for Justice to award compensation to defendants who have been the victims of miscarriages of justice under s.133 and the policy implications of a broad interpretation versus a narrow interpretation. The Supreme Court in *Adams* sat as a specially constituted bench of 9 judges, made up of 8 Supreme Court Justices (including the then President of the Supreme Court, Lord Phillips, and the Deputy President of the Supreme Court, Lord Hope) and the Lord Chief Justice. The Court relied upon the four categories of "miscarriage of justice" identified by Dyson LJ in the Court of Appeal. Lord Phillips set out these categories (albeit with an amended category 2) as follows:

(1) where there is fresh evidence that shows clearly that the defendant is innocent of the offence;
(2) where there is fresh evidence such that, had it been available at the trial, no reasonable jury could convict the defendant (this was amended by Lord Phillips to make the test "more robust": the new evidence must so undermine the case against the defendant that "no conviction could possibly be based upon it" (see [55]));
(3) where there is fresh evidence rendering the conviction unsafe; and
(4) 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.

Category 1 is the most restrictive approach to the award of compensation because it requires new evidence which conclusively proves that the defendant is innocent. This approach was favoured by the minority in the Supreme Court (consisting of Lord Judge CJ, Lord Brown, Lord Roger and Lord Walker).[6] The majority also agreed that

[4] *ibid.* at [14]
[5] (Application no. 25424/09), 12 July 2013, European Court of Human Rights
[6] For a more detailed discussion of the minority judgments of Lord Judge CJ and Lord Brown, see Monaghan, N. and Malcolm, T., "Restricting compensation for miscarriages of justice to

defendants falling within this category should receive compensation. Category 2 represents a wider approach and applies in cases in which the new evidence so undermined the case against the defendant that "no conviction could possibly be based on it".[7] This category was originally framed by Dyson LJ in a way which resembled a form of *Wednesbury* unreasonableness applied prospectively. However, Lord Phillips' attempted to tighten the scope of category 2 by reformulating the test in this way.

The five Justices in the majority in the Supreme Court, (Lord Phillips, Lord Kerr, Lord Clarke, Baroness Hale and Lord Hope), held that the statutory test for compensation claims under s.133 covered cases falling within category 2, as well as cases within category 1. The minority took a literal approach to the interpretation of s.133, with Lord Judge CJ placing great emphasis on the use of the phrase "beyond reasonable doubt." To this end, the minority construed the phrase as requiring conclusive proof of the defendant's innocence as per category 1. In the words of Lord Judge CJ, for s.133 to apply new evidence had to show "that justice had surely miscarried"[8] and this would only be achieved through the restriction of award of compensation to cases under category 1. This approach also reflects the position under article 14.6 of the International Covenant on Civil and Political Rights 1966, which provides that the defendant has a right to compensation where he "conclusively" shows that a miscarriage of justice has occurred,[9] and it is submitted, is a true interpretation of s.133. It is difficult to see the rationale for deviating from a purely literal interpretation of s.133 so as to encompass category 2. It is also apparent that the Justices in the majority in the Supreme Court took slightly different approaches to reformulating the test in category 2, and it will be seen later that the Divisional Court has more recently preferred the reformulation by Lord Clarke and Lord Kerr which uses similar wording to the prospective *Wednesbury* unreasonableness test outlined above.

Category 3 is wider still, requiring new evidence which renders the conviction unsafe. This represents the traditional test applied by the Court of Appeal in deciding whether or not to overturn a conviction. The Court of Appeal will only overturn a conviction if it takes the view that the conviction is "unsafe". Categories 2 and 3 are the most similar of the four categories, although they do carry a significant difference and it is possible to see the rationale for the decision of the majority not to support the award of compensation in category 3 cases even though the majority favoured awarding compensation in category 2 cases. If the courts did decide that category 3 cases fall within the interpretation of "miscarriage of justice" under s.133, the courts would effectively fetter the statutory power given to the Secretary of State for Justice to

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the truly innocent" in Geach, N. and Monaghan C. (eds.), *Dissenting Judgments in the Law* (2012, Wildly Simmonds and Hill Publishing) at pp. 363–376.

[7] Above n.3 at [55]

[8] ibid. at [248]

[9] The precise wording of article 14(6) of the International Covenant on Civil and Political Rights 1966 is: "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 the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

decide whether to award compensation in cases where the defendant's conviction has been overturned. This would have the consequence of removing any decision-making power from the Secretary of State for Justice, thus effectively rendering an award of compensation automatic upon the overturning of a conviction. While the courts play a significant role in scrutinising the exercise of executive power, it is important that they do not remove that power bestowed upon the Secretary of State for Justice by Parliament. As such, it must be right that category 3 cases do not fall within s.133.

Category 4 is the widest of all of the categories and applies where there has been some serious abuse of process in the investigation or trial which results in the conviction of someone who should not have been convicted. This broad category was highlighted by Lord Bingham in the House of Lords in *R (Mullen) v Secretary of State for the Home Department*.[10] In *Mullen*, Lord Steyn and Lord Bingham disagreed, with Lord Steyn preferring a narrow approach according to which a defendant would only be eligible for compensation if he was "demonstrably innocent" (equivalent to Dyson LJ's category 1). However, Lord Bingham suggested that in "ordinary parlance" the term "wrongly convicted" would extend to cover situations where even though it is not possible to conclusively show that the defendant is innocent, "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"[11] (a much broader view equivalent to Dyson LJ's category 4). In the later cases of *R (Allen) v Secretary of State for Justice*[12] and *R (Siddall) v Secretary of State for Justice*,[13] the Court of Appeal and Divisional Court respectively, preferred the narrow approach adopted by Lord Steyn.

However, it is clear that the decision of the majority in *Adams* takes the middle ground. The Justices did not think that the award of compensation should be limited to category 1 cases, thus rejecting the restrictive approach of the minority, and they were not prepared to fully extend the scope of s.133 to cover category 4 cases. Lord Phillips expressed concern that should category 4 cases be covered by s.133, "it would result in the payment of compensation to criminals whose guilt was not in doubt" and thus would "be likely to defeat the subsidiary object of section 133".[14] Lord Judge CJ stated that a "half-way house" solution of extending the scope of s.133 beyond category 1 cases was not consistent with the statutory provision.

Case 2: *R (on the application of Ali) v Secretary of State for Justice* [2013] WLR (D) 35

The case of *Ali* involved five separate applications for judicial review, challenging the decision of the Secretary of State for Justice not to award compensation to each of the five applicants whose convictions had been overturned by the Criminal Division of the Court of Appeal. The applications were based upon the decision of the Supreme Court in the case of *Adams* to extend the scope of s.133. The issues which arose to be considered by the Divisional Court were summarised in 8 questions:

[10] [2005] 1 AC 1
[11] ibid. at 24
[12] [2008] EWCA Civ 808
[13] [2009] EWHC 482 (Admin)
[14] Above n.3 at [38]

(1) When will a person be demonstrated to be clearly innocent so as to fall within category 1?
(2) In what circumstances will evidence be "so undermined" by a new fact or facts that no conviction could be based upon that evidence, so that the case falls within category 2?
(3) What is the proper approach for the Secretary of State to take when considering the decision of the Court of Appeal quashing the conviction of a person who subsequently makes an application under s.133?
(4) What test is to be applied for the purposes of s.133 where there has been a retrial after the conviction was quashed?
(5) In what situations should the Secretary of State reconsider applications which have been refused by the application of a test other than that set out by the Supreme Court in *Adams*?
(6) To what extent must the Secretary of State apply procedural and evidential rules in determining whether particular forms of evidence are admissible or not?
(7) What is the role of the court in determining these applications for judicial review in the light of (i) common law principles, and (ii) the European Convention on Human Rights?
(8) What is the outcome of the challenges by the five claimants?

Only one applicant, Lawless, was successful in his application for judicial review. In relation to the first question, the Court held that while the issue did not arise in the present case, where it did arise each case should be assessed on its own facts. Thus no general principle could be propounded. The most relevant question was question 2 regarding the cases falling within category 2. The Divisional Court considered the general application of category 2 and held that while Lord Phillips' reformulated test did require the high criminal standard of proof (the inclusion of the word "possibly" indicated to the Court that a high standard of proof should apply), the tests formulated by Lord Clarke and Lord Kerr were "more sensitive to the trial processes" and "more readily useful to lawyers advising claimants and the Secretary of State".[15] The test approved by the Divisional Court was:

> "Has the claimant established, beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered?"[16]

In relation to question 3, the approach of the Secretary of State in each case would depend upon the individual judgment of the Court of Appeal. The Court of Appeal is only concerned with the safety of a conviction and not with the more specific question of whether the defendant is truly innocent or not. A general principle was identified as applicable to questions 3, 4 and 6, namely that the Secretary of State must accept the decision of the Court of Appeal or ruling of the trial judge, unless there are exceptional circumstances, such as fresh evidence after the appeal. Where a trial judge exercises his discretion, the Divisional Court acknowledged that approaches vary, and that in such circumstances the Secretary of State may conclude that a different approach might be taken, provided that this is justified. Regarding question 5, the

[15] Above n.4 at [40]–[41]
[16] *ibid.* at [41]

Court concluded that the Secretary of State is not required to reconsider all decisions relating to awards of compensation under s.133 made before the decision of the Supreme Court in *Adams*. This policy decision is clearly based upon a concern that any other conclusion would open the floodgates and have vast and unmanageable economic consequences.

The Divisional Court considered that its role was only supervisory in respect of the decision of the Secretary of State under s.133. The court should not itself carry out an assessment into whether s.133 had been satisfied. The Court was also satisfied that there was no violation of article 6.2 of the European Convention of Human Rights and the right to a fair hearing by an "independent and impartial tribunal" was safeguarded by the judicial review process itself.

Accountability

Both *Adams* and *Ali* raise important issues relating to executive and legislative accountability and the role of the courts in scrutinising the functions and decisions of both Parliament and the Secretary of State for Justice. They also touch upon the rule of law, specifically in relation to the need to ensure that the law is clear and accessible such that people are able to determine their eligibility for compensation under the scheme.

The statutory test as to when compensation should be awarded has been decided by the legislature, which in turn grants powers to the Secretary of State for Justice, on behalf of the government, to decide whether in an individual case a defendant should be awarded compensation. The role of the judiciary has been significant in two aspects: firstly, in interpreting the statutory provision under s.133 in *Adams* and thus ruling on the scope of the powers held by the executive, and secondly by scrutinising the decision made by the Secretary of State for Justice in *Ali*, in respect of five separate cases, through the mechanism of judicial review. These two cases clearly demonstrate the very different ways in which the judiciary keeps an essential check on the exercise of the powers of the legislature and the executive. However, it is also important to ensure that in holding the executive to account, the judiciary take only a supervisory role in ensuring that the Secretary of State for Justice uses his or her powers in accordance with the statutory test laid down by Parliament. Establishing the true intention of Parliament in enacting s.133 is of the utmost importance if the courts are to ensure that the legal sovereignty of Parliament is respected. It is not the role of the judiciary to redefine the powers of the Secretary of State for Justice taking these beyond the scope of the intention of Parliament. Neither is it the role of the judiciary to interpret s.133 so widely as to effectively usurp the powers of the executive.

It has been argued that the true interpretation of s.133 is a literal interpretation which restricts the scope of those eligible to claim compensation to those who are conclusively proved to be innocent (in accordance with category 1). Thus, on this view, the case of *Adams* was wrongly decided and the dissenting views of Lord Judge CJ and Lord Brown are right. This was Parliament's true intention and it is argued that this conclusion is borne out in the recent proposals for reform in the Anti-Social Behaviour, Crime and Policing Bill 2013-14 (discussed in the Reform section at the end of this paper). The broader interpretation of the statutory scheme followed by the courts effectively serves to depart from the intention of parliament and usurp the

powers of the Secretary of State for Justice. Nevertheless, in the event that the courts do not follow the true intention of Parliament in interpreting statute (as it is submitted they indeed did not in these cases), Parliament is free to legislate in order to "clarify" the criteria required for compensation, and this is exactly what the legislature has sought to do in light of the decisions in *Adams* and *Ali*.

Case 3: *Allen v United Kingdom*, 12 July 2013, European Court of Human Rights

The European Court of Human Rights recently heard the case of *Allen v United Kingdom*[17] in which the applicant challenged a decision not to grant her compensation after her conviction was quashed. Allen was convicted of the manslaughter of her four-month old son and sentenced to 3 years imprisonment. The conviction was based upon expert evidence regarding "shaken baby syndrome". However, after other high profile miscarriages of justice highlighted the unreliability of such expert evidence, Allen's conviction was quashed by the Court of Appeal on the basis that it was unsafe.[18] Allen sought compensation under s.133 for the miscarriage of justice that she had suffered, but her application was refused. She judicially reviewed the decision of the Secretary of State, but her claim was dismissed. She then appealed to the Court of Appeal, but her appeal was also dismissed. Finally, Allen took her case to the European Court of Human Rights, claiming that the decision to refuse to compensate her unless she proved beyond reasonable doubt that there had been a miscarriage of justice constituted a violation of the presumption of innocence under article 6.2 of the European Convention on Human Rights.

The Grand Chamber of the European Court of Human Rights ruled that there was no violation of article 6.2. The Court acknowledged that while article 6.2 clearly protects those charged with a criminal offence, another aspect of the provision is "to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged."[19] In determining whether there had been a violation of article 6.2, the Court emphasised the importance of the language used by the decision-maker[20] in the sense that this must show that the applicant has been treated in a manner consistent with innocence. Noting that s.133 required that the appeal against conviction be allowed on the ground that a new fact showed beyond reasonable doubt that there had been a miscarriage of justice, the Court held that this requirement in itself did not call into question the innocence of the applicant. The Court further concluded that the Secretary of State and Court of Appeal had not questioned the decision of the Criminal Division of the Court of Appeal in quashing the applicant's conviction and did not comment on whether she might be acquitted or convicted in light of the new evidence. Thus, the Court stated that it "does not consider that the language used by the domestic courts... can be said to have undermined the applicant's acquittal or have treated her in a manner inconsistent with her innocence."[21] Accordingly, there was held to have been no violation of article 6.2.

[17] Above, n.6
[18] For example, see *R v Clark (Sally)* [2003] EWCA Crim 1020 and *R v Cannings (Angela)* [2004] 1 WLR 2607
[19] Above, n.5 at [94]
[20] ibid. at [126]
[21] ibid. at [134]

Would adopting a narrow interpretation of s.133 violate article 6.2?

As stated above, on a true interpretation of s.133, the dissenting views of Lord Judge CJ and Lord Brown in *Adams* are correct and the scope of eligibility for compensation under s.133 would be restricted to those who are conclusively proved to be innocent. However, once an appellant has been acquitted, "it is not open to the state to undermine the effect of the acquittal."[22] One question which needs to be addressed is whether, a narrow category 1 interpretation of s.133 would be compatible with article 6.2. In *Adams*, this issue was debated in argument before the court and the *dicta* from both justices in the minority and the majority suggests that there would be no such violation of the presumption of innocence if a narrow approach were adopted. It is submitted that this must be right.

It has been argued that article 14.6 of the International Covenant on Civil and Political Rights 1966 is comparable to a true interpretation of s.133. Article 14.6 provides that the defendant has a right to compensation where he "conclusively" shows that a miscarriage of justice has occurred. Article 3, Protocol 7 of the European Convention of Human Rights contains an almost identical provision.[23] While the United Kingdom has not ratified the 7th Protocol of the Convention, this provision sits in the same Convention as article 6.2 without violating the presumption of innocence. It is also worth noting that article 14.2 of the International Covenant on Civil and Political Rights also provides for the presumption of innocence in a similar fashion to article 6.2. In *Mullen*, Lord Steyn considered the relationship between these two provisions and concluded that article 14.6 was a *lex specialis* which "creates an independent fundamental right governed by its own express limits"[24] such that "the general provision for a presumption of innocence does not have any impact on it".[25] The same reasoning must surely also be applied to the co-existence of s.133, Criminal Justice Act 1988 and article 6.2 of the European Convention.

In *Adams*, Lord Phillips took care to point out that in his view, any of the four proposed interpretations of "miscarriage of justice" would be compatible with the presumption of innocence:

> "On no view does [s.133] make the right to compensation conditional on proof of innocence by a claimant. The right to compensation depends upon a new or newly discovered fact showing beyond reasonable doubt that a miscarriage of justice has occurred. Whatever the precise meaning of 'miscarriage of justice' the issue in the

[22] Above n.3 at [111], per Lord Hope

[23] The precise wording of article 3, Protocol 7 of the European Convention on Human Rights is: "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 the law *or the practice of the State concerned*, unless it is proved that the non--disclosure of the unknown fact in time is wholly or partly attributable to him". The additional words in article 3 are shown in italics [author's emphasis].

[24] Above n.11 at 40

[25] Ibid. at 42

> individual case will be whether it was conclusively demonstrated by the new fact. The issue will not be whether or not the claimant was in fact innocent. The presumption of innocence will not be infringed".[26]

Similarly, Lord Hope stated that:

> "A refusal of compensation under section 133 on the basis that the innocence of the convicted person has not been clearly demonstrated, or that it has not been shown that the proceedings should not have been brought at all, does not have the effect of undermining the acquittal."[27]

Additionally, His Lordship drew a distinction between the proceedings in a criminal court which is overseen by the judiciary and the procedure under s.133 which provides for a decision to be taken by the executive. Lord Judge CJ commented that s.133 "is concerned with the fact rather than the presumption of innocence in the context of the administrative decision to be made by the Secretary of State" and that it is not related to "aspects of the trial processes, or the likely or possible impact which the new or newly discovered fact would have had on the decision to prosecute or on the forensic processes which culminated in conviction."[28]

Lord Hope also noted that even where a person has been acquitted on appeal, it is perfectly permissible to make comments on the underlying facts of the case in later proceedings, such as a civil claim for damages. Lord Judge CJ compared the assessment of eligibility for compensation with other forms of legal action. He also concluded that an acquittal does not prevent other forms of legal action from being pursued against the acquitted individual:

> "…the acquittal, or the successful appeal against conviction, does not operate as an absolute bar to litigation. It remains open to any individual to assert that notwithstanding the acquittal or quashing of the conviction, the defendant was guilty. That is what Lord Steyn said about *Mullen* in his judgment in that case. A defendant who has been acquitted of rape may face proceedings for damages by the complainant and she may successfully establish on the balance of probabilities that he did indeed rape her and is liable in damages. In proceedings for defamation on the basis that the defendant's innocence is questioned, the acquittal does not create an irrebuttable presumption that the assertion cannot be justified and must be unjustifiable".[29]

In light of the above, it must be right that even on a narrow interpretation of s.133, the provision is compatible with article 6.2.

[26] Above n.3 at [58]
[27] Ibid. at [111]
[28] Ibid. at [263]
[29] Ibid. at [255]

Recent proposals for reform

On 9 May 2013, the Ministry of Justice published an Impact Assessment[30] which sought to clarify the circumstances in which compensation is available and limit these to defendants who are "clearly innocent". The government has proposed legislating in order to provide a definition of the term "miscarriage of justice" for the purposes of s.133, Criminal Justice Act 1988 and to this end the Anti-Social Behaviour, Crime and Policing Bill 2013-14 is currently before Parliament. At the time of writing, the Bill is at the Report Stage in the House of Lords. Clause 161 of the Bill seeks to restrict the scope of eligibility for compensation by inserting subsection 1ZA into the Criminal Justice Act 1988 after s.133(1). The proposed amendment would provide a definition of "miscarriage of justice" under s.133 such that an award of compensation can be made "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence". This would have the effect of reversing the decision of the Supreme Court in *Adams* and the Divisional Court in *Ali* and reflects the narrow interpretation in category 1 as identified by Dyson LJ in the Court of Appeal in *Adams*. It would also provide some much-needed clarification to the law so that defendants are aware of the circumstances in which compensation for a miscarriage of justice will be paid out.

[30] Ministry of Justice, *Clarifying the circumstances under which compensation is payable for Miscarriages of Justice (England and Wales)*, IA No. MOJ202, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197579/DOC002.PDF (accessed on 18th June 2013).