Neutral Citation Number: [2016] EWCA Civ 355

Case No: (1) C1/2015/2135 &
(2) C1/2015/2145

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
LORD JUSTICE BURNETT & MRS JUSTICE THIRLWALL
(1) CO/5272/2014 & (2) CO/4240/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2016

Before:

LORD DYSON
(THE MASTER OF THE ROLLS)
SIR BRIAN LEVESON
(THE PRESIDENT OF THE QUEEN'S BENCH DIVISION)
and
LORD JUSTICE HAMBLEN

- -

Between:

THE QUEEN, ON THE APPLICATIONS OF

(1) SAM HALLAM	**Appellants**
(2) VICTOR NEALON	
- and -	
THE SECRETARY OF STATE FOR JUSTICE	**Respondent**

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Heather Williams QC and Adam Straw (instructed by **Birnberg Peirce & Partners**) for the **First Appellant**
Matthew Stanbury and Joseph Markus (instructed by **Quality Solicitors Jordans**) for the **Second Appellant**
James Strachan QC and Mathew Gullick (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 9 & 10/3/2016

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Approved Judgment

The Master of the Rolls:

1. The appellants were convicted of serious criminal offences and had their initial appeals against conviction dismissed. Their cases were later referred to the Court of Appeal Criminal Division ("CACD") by the Criminal Cases Review Commission. The appeals were allowed. Their claims in these proceedings raise a common single issue arising from the decisions of the Secretary of State for Justice to refuse to pay them compensation under section 133 of the Criminal Justice Act 1988 ("the 1988 Act") as amended by the Anti-Social Behaviour, Crime and Policing Act 2014. Section 133(1) as originally enacted provided that:

> "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."

2. Section 133 was enacted to give effect to the UK's international obligations under article 14(6) of the International Covenant on Civil and Political Rights 1966 ("the ICCPR"), which was ratified by the UK in May 1976. There is an almost identical provision in article 3 of the Seventh Protocol ("A3P7") of the European Convention on Human Rights ("ECHR"). Article 14(6) of the ICCPR 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 the non-disclosure of the unknown fact in time is wholly or partly attributable to him.".

3. The term "miscarriage of justice" was not defined in the statute when originally enacted. This lack of definition gave rise to a series of cases in which the courts sought to interpret the meaning of the term, culminating in the Supreme Court decision in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48, in which four categories of case were considered as candidates for satisfying the statutory definition. These were (1) where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted; (as reformulated by the Supreme Court) (2) where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it; (3) where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant; 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. By a majority, the Supreme Court held that the term included category 1 and 2 cases, but no other. The minority view was that the term was restricted to category 1 cases.

4. Following the previous uncertainty as to its meaning and the litigation that it had generated, Parliament inserted, with effect from 13 March 2014, a new statutory definition of "miscarriage of justice" in sub-section (1ZA) of section 133. The new definition applies to the appellants' applications for compensation in this case. Section 133 (1ZA) provides:

> "For the purpose of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales….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)."

5. The appellants contend that section 133 (as amended) of the 1988 Act is incompatible with article 6(2) of the ECHR. They seek a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 ("the HRA"). In Mr Nealon's case, there is a further argument that the decision of the Secretary of State to refuse compensation was, in any event, unlawful on domestic public law grounds.

6. Their claims were rejected by the Divisional Court (Burnett LJ and Thirlwall J): [2015] EWHC 1565 (Admin). Burnett LJ gave the only substantive judgment. The court gave both appellants permission to appeal against its findings that article 6(2) was not applicable to section 133 (as amended) and that was in any event compatible with article 6(2) of the ECHR. It refused Mr Nealon permission to appeal against its decision in relation to the public law challenge. Mr Nealon has renewed his application for permission to appeal on that ground.

7. The material facts are set out at paras 3 to 13 of the judgment of Burnett LJ. I reproduce this part of his judgment as an Annex to this judgment.

Summary of the Divisional Court's reasons for refusing a declaration of incompatibility

8. The Divisional Court held that (i) it was bound by the Supreme Court's decision in *Adams* and by the Court of Appeal's decision in *R (Allen) v Secretary of State for Justice* [2008] EWCA Civ 808, [2009] 1 Cr App R 2 to hold that article 6(2) is not applicable to compensation decisions made under section 133 of the 1988 Act; (ii) despite the contrary decision of the Grand Chamber in *Allen v United Kingdom* (2013) 36 BHRC 1, it was not necessary or appropriate to grant permission to appeal to the Supreme Court because an argument based on the Grand Chamber decision that section 133 (as amended) offends against the presumption of innocence (if article 6(2) did apply) would be wrong.

Summary of the appellants' submissions

9. The appellants say that the Divisional Court erred in law in that (i) neither it nor the Court of Appeal is bound by *Adams* or the Court of Appeal decision in *Allen* to find

that article 6(2) does not apply to compensation decisions made under section 133; (ii) Strasbourg authority, in particular the Grand Chamber decision in *Allen*, shows that article 6(2) applies to section 133 compensation proceedings; (iii) it is also clear from Strasbourg authority that the ECtHR would decide that section 133 (as amended) offends against the presumption of innocence; (iv) it follows that section 133 (as amended) is incompatible with article 6(2) and the court ought to grant a declaration of incompatibility; alternatively (v) if this court is bound by domestic authority to come to a different conclusion, then it ought to give permission to appeal to the Supreme Court: that is because any domestic binding authority is inconsistent with subsequent Strasbourg authority and it is necessary and appropriate for the Supreme Court to resolve this apparent inconsistency.

IS THIS COURT BOUND BY ADAMS *TO HOLD THAT ARTICLE 6(2) DOES NOT APPLY?*

10. The issue before the Supreme Court in *Adams* was: what was the true meaning of the phrase "miscarriage of justice" in section 133? The court decided by a majority of 5 to 4 that, having regard to article 14(6) of the ICCPR, the true meaning of the phrase in section 133 was that it included both category 1 and category 2 cases, but no other category. Lords Judge, Rodger, Walker and Brown held that the meaning of the phrase was restricted to category 1 cases.

11. The first question that the Divisional Court had to decide was whether it was bound by the reasoning of a majority of the judges in Adams that section 133 constituted a *lex specialis* in which article 6(2) of the ECHR had no part to play. If the Divisional Court was right to hold that it was so bound, then this court would be similarly bound regardless of whether, as Miss Williams QC submits to be the case, the Grand Chamber in *Allen* subsequently decided that article 6(2) does apply to section 133. It is not in dispute that, even if we consider that Miss Williams is right, we are obliged to adhere to our domestic rules of precedent and follow *Adams*: see *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 at para 43.

12. It is, therefore, necessary to examine the judgments in *Adams* closely to see what was decided in that case about the applicability of article 6(2) to section 133.

13. Mr Adams' case was a category 3 case. He contended that the adoption of a narrow interpretation of section 133 (excluding category 3 cases) would involve a breach of article 6(2) of the ECHR; and that, once his conviction had been quashed (for whatever reason), he was entitled to be treated as innocent in the context of a claim for compensation. This is clear from the argument of Mr Adams' counsel recorded at p 56B-H of the report: see, in particular, the submission that "article 6.2 therefore applies to an application under section 133)." A similar submission was made on behalf of JUSTICE (intervening). This is recorded at p 61D-F of the report: see, in particular, the submission that "the effect of the jurisprudence of the European Court of Human Rights is that the presumption of innocence applies to proceedings for compensation following an acquittal".

14. Lord Hope at para 108 noted that Mr Owen QC (counsel for Mr Adams) had submitted that a narrow interpretation of article 14.6 of the ICCPR would conflict with the presumption of innocence in article 6(2). Lord Hope analysed some of the Strasbourg jurisprudence before stating his conclusion on this issue at para 111:

> "The principle that is applied is that it is not open to the state to undermine the effect of the acquittal. What article 14.6 does not do is forbid comments on the underlying facts of the case in subsequent proceedings of a different kind, such as a civil claim of damages, when it is necessary to find out what happened. The system that article 14.6 of the ICCPR provides does not cross the forbidden boundary. The procedure laid down in section 133 provides for a decision to be taken by the executive on the question of entitlement to compensation which is entirely separate from the proceedings in the criminal courts. As Lord Steyn pointed out in *Mullen* [2005] 1 AC 1, paras 41to 43, in none of the cases from Austria or Norway, nor in *Leutscher v The Netherlands* 24 EHRR 181, was the court called upon to consider the interaction between article 6.2 and article 3 of the Seventh Protocol. On the contrary, the fact that the court was careful to emphasise in *Sekanina v Austria*, para 25 that the situation in that case was not comparable to that governed by article 3 of the Seventh Protocol is an important pointer to the conclusion that, as Lord Steyn put it in *Mullen*, para 44, article 14.6 and section 133 of the 1988 Act are in the category of lex specialis and that the general provision for a presumption of innocence does not have any impact on them. 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."

15. Lord Phillips dealt with the issue at para 58. He agreed with Lord Hope and also with the reasoning of Hughes LJ at para 35 of the Court of Appeal decision in *Allen.* Lord Phillips added:

> "The appellants' claims are for compensation pursuant to the provisions of section 133. On no view does that section 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 individual case will be whether it was conclusively demonstrated by the new fact. The issue will not be whether the claimant was in fact innocent. The presumption of innocence will not be infringed."

16. Lord Kerr agreed with Lord Hope on this topic (para 181). The difference in the language used by Lord Phillips and Lord Hope is immaterial. They both said in different ways that article 6(2) did not apply. Lord Clarke said at para 230 that he was not persuaded that section 133 was a form of *lex specialis* to which article 6(2) could never be relevant. Lady Hale did not refer to article 6(2) specifically, although she said at para 116 that it seemed wrong in principle that an applicant under section 133 was required to prove his innocence. Lord Walker and Lord Brown agreed with the judgment of Lord Judge. In particular, Lord Brown agreed with what Lord Judge said

at paras 255 and 256 about the relevance of the Strasbourg jurisprudence in this context. That is why it is common ground that what Lord Judge said about the applicability of article 6(2) to section 133 is critical to the question whether the decision in *Adams* is binding on this court. If Lord Judge agreed with Lord Phillips, Lord Hope and Lord Kerr that article 6(2) was irrelevant to section 133, then that was an essential part of the reasoning of the majority of the Supreme Court on that issue. It was central to the case of Mr Adams that article 6(2) applied to an application under section 133 and that, *for that reason*, a narrow interpretation of "miscarriage of justice" which at least excluded category 3 cases from its ambit should be rejected because it would be incompatible with article 6(2).

17. Lord Judge said:

> "255. In my judgment the jurisprudence of the European Court of Human Rights drawn to our attention by Mr Owen does not bear on the issues which arise in this litigation. As already indicated once a conviction has been reversed the presumption of innocence applies. Subject only to the provisions of sections 76-83 of the Criminal Justice Act 2003 the rule against double jeopardy applies and the defendant cannot be prosecuted a second time for an offence of which he has been acquitted, or when his conviction has been reversed and for the purposes of the administration of criminal justice the prosecution process is at an end. Nevertheless 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. "
>
> 256. Article 3, Protocol 7 forms part of the Convention. It must be read together with the Convention. The jurisprudence of the European Court of Human Rights relied on by Mr Owen was not directed to and did not address the provisions of article 3, Protocol 7. If the decisions he relied on apply in the present case it will in effect mean that the reversal of the conviction carries with it an obligation to pay compensation in accordance with section 133, although such a conclusion would be inconsistent with the wording of article 3, Protocol 7 itself. *Bok v The Netherlands* (Application No 45482/06) (unreported) 18 January 2011 confirms that it does not.
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> 257. Section 133 therefore provides an individual whose conviction has been reversed with the opportunity (but no

> obligation) to make a claim for compensation based on a statutory test which is effectively identical to the provisions of the European Convention. The Secretary of State must allow or reject the application in accordance with that test".

18. Miss Williams submits that it is not clear whether Lord Judge's conclusion was about the *application* of the obligation in article 6(2) to compensation assessments or about the *content* of the obligation. She submits that it does not follow from the rejection of Mr Adams' broad submission that Lord Judge decided that article 6(2) did not apply at all to section 133 assessments. If Lord Judge agreed with the reasoning of Lord Hope, he could easily have said so, as did Lord Phillips and Lord Kerr.

19. In my view, it *is* clear that Lord Judge considered that article 6(2) had no application to section 133. The first sentence of para 255, if read in isolation, can only sensibly be read as saying that article 6(2) has no application to section 133, i.e. rejecting the submissions of Mr Adams and JUSTICE to which I have referred. One of the issues which arose in this litigation was whether those submissions were correct. This meaning of the first sentence is not undermined by the fact that, in the remaining part of the paragraph, Lord Judge gave examples of cases where the presumption of innocence does apply but is not violated. What Lord Judge said in para 256 provides further support for my interpretation of the first sentence of para 255. In the third sentence of para 256, Lord Judge said that the Strasbourg jurisprudence relied on by Mr Owen was "not directed to and did not address" the provisions of A3P7 (which is expressed in substantially the same language as section 133). Moreover, it is implicit in the wording of the fourth sentence of para 256 that Lord Judge was saying that the jurisprudence relied on by Mr Owen (i.e. the article 6(2) jurisprudence) did not apply to section 133. This must follow from his statement that, if the jurisprudence did apply, the result would be an obligation to pay compensation in accordance with section 133, which would be inconsistent with the wording of A3P7 itself.

20. Lord Brown, in agreeing with Lord Judge on this issue, noted at para 282 that: "It hardly needs pointing out that, were the Strasbourg cases to present a problem, they would do so no less for the majority than for the minority view". In other words, whether "miscarriage of justice" includes both category 1 and 2 cases or is limited to the former, the Strasbourg cases do not "present a problem". The most obvious interpretation of what Lord Brown was saying is that the Strasbourg cases do not present a problem because article 6(2) does not apply.

21. In my view, therefore, the Divisional Court was right to hold that the *ratio* of the decision in *Adams* on the article 6(2) issue is that article 6(2) is not applicable to the operation of section 133, whatever definition of "miscarriage of justice" is adopted. *Adams* is binding precedent on that point, for the reasons given by Lord Bingham in *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465 at paras 40 to 45. This remains the position regardless of any subsequent observations of the ECtHR in *Allen v UK* and later cases.

22. In these circumstances, it is not necessary to consider whether, as the Divisional Court held, this court is also bound to reach the same conclusion by reason of the decision of this court in *Allen.*

23. In the result, we are bound to dismiss the appeal. But we heard full argument, in the light of *Allen v UK* and the subsequent Strasbourg jurisprudence, on (i) whether article 6(2) does apply to section 133 (as amended) and (ii) if it does, whether section 133 (as amended) is incompatible with article 6(2). I need to express my conclusions on these questions not only because they are of obvious importance, but also because they are relevant to whether we should give permission to appeal to the Supreme Court as we are invited to do by the appellants.

DOES ARTICLE 6(2) APPLY TO SECTION 133 (AS AMENDED)?

24. It will be necessary to examine the decision of the Grand Chamber in *Allen v UK* in more detail when I consider whether section 133 (as amended) is incompatible with article 6(2). At this stage, limited citation is sufficient. *Allen v UK* was a category 3 case in which, following the quashing of her conviction, the applicant claimed compensation under section 133 of the 1988 Act. Her claim was rejected by the Secretary of State and in the domestic courts. She complained to the ECtHR that the reasons given for the refusal of compensation violated her right under article 6(2) to be presumed innocent. The UK Government contended, *inter alia*, that the application was inadmissible because the presumption of innocence was not engaged in the context of decisions taken under section 133. It is, therefore, clear that the applicability of article 6(2) was directly in issue.

25. The Grand Chamber considered this issue between paras 92 and 109 of its judgment. It conducted a detailed analysis of the relevant Strasbourg jurisprudence on the application of article 6(2). In short, it said that whether article 6(2) applied to claims for compensation arising from criminal proceedings depended on whether there was a sufficient link between the criminal proceedings and the claim for compensation. One approach adopted in the case law was to ask whether the criminal responsibility of the accused and the right to compensation were linked "to such a degree that the decision on the latter issue could be regarded as a consequence and, to some extent, the concomitant of the decision on the former" (para 99). Another approach was to ask whether "the decision on civil compensation contained a statement imputing criminal liability [which] would create a link between the two proceedings such as to engage article 6(2) in respect of the judgment on the compensation claim" (para 101).

26. This case law had been previously considered by our Supreme Court in *SOCA v Gale* [2011] UKSC 49, [2011] 1 WLR 2760. It seems that this decision was not considered by the Grand Chamber in *Allen v UK* (it may not have been cited). The Supreme Court was less than complimentary about the relevant Strasbourg jurisprudence. Thus, for example, Lord Phillips said at para 32 that "this confusing area of Strasbourg law would benefit from consideration by the Grand Chamber."

27. Having considered the jurisprudence, the Grand Chamber concluded as follows:

> "103. The present case concerns the application of the presumption of innocence in judicial proceedings following the quashing by the CACD of the applicant's conviction, giving rise to an acquittal. Having regard to the aims of Article 6 § 2 discussed above (see paragraphs 92-94) and the approach which emerges from its case-law review, the Court would formulate the principle of the presumption of innocence in this

> context as follows: the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, 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. This overriding concern lies at the root of the Court's approach to the applicability of Article 6 § 2 in these cases.
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> 104. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt.
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> 105. Having regard to the nature of the Article 6 § 2 guarantee outlined above, the fact that section 133 of the 1988 Act was enacted to comply with the respondent State's obligations under Article 14(6) ICCPR, and that it is expressed in terms almost identical to that Article and to Article 3 of Protocol No. 7, does not have the consequence of taking the impugned compensation proceedings outside the scope of applicability of Article 6 § 2, as argued by the Government. The two Articles are concerned with entirely different aspects of the criminal process; there is no suggestion that Article 3 of Protocol No. 7 was intended to extend to a specific situation general guarantees similar to those contained in Article 6 § 2 (compare and contrast *Maaouia v. France* [GC], no. 39652/98, §§ 36-37, ECHR 2000-X). Indeed, Article 7 of Protocol No. 7 clarifies that the provisions of the substantive Articles of the Protocol are to be regarded as additional Articles to the Convention, and that "all the provisions of the Convention shall apply accordingly". Article 3 of Protocol No. 7 cannot therefore be said to constitute a form of *lex specialis* excluding the application of Article 6 § 2".

28. This is a very clear statement by the Grand Chamber precisely on the issue of whether article 6(2) applies to claims for compensation for miscarriages of justice under

section 133. It is a carefully considered decision which was intended to be authoritative. It was made in the teeth of the Government's invitation to the court (set out at para 87) to conclude that the presumption of innocence was not engaged at all in the context of decisions taken under section 133 and, in consequence, to declare the application inadmissible. The Government's case had been that, because section 133 was enacted to comply with the state's obligations under article 14 (6) of the ICCPR, it was a form of *lex specialis* that fell outside the scope of article 6(2). The ECtHR concluded to the contrary that there was a sufficient link between the earlier criminal proceedings and the determination of eligibility for compensation under section 133 for the article 6(2) presumption of innocence to apply to the latter. This was because the assessment of whether the section 133 criteria were met inevitably involved an examination of the CACD's judgment: see paras 107 and 108.

29. Mr Strachan QC recognises that the Grand Chamber decided that article 6(2) is applicable to a claim for compensation under section 133. He submits, however, that we should not follow this decision on the grounds that it is not adequately reasoned and does not address the analysis of Lord Phillips, Lord Hope and Lord Judge in *Adams.* Nor does it deal with the criticisms expressed by the Supreme Court in *Gale.*

30. Mr Strachan submits that there is no "clear and constant" line of Strasbourg authority to the effect that article 6(2) is applicable to a decision to refuse compensation under section 133. Even if there were, he says that it would be open to the domestic courts not to follow it on the basis that the approach articulated by Lord Phillips, Lord Hope and Lord Judge is clearly to be preferred.

31. I have no hesitation in saying that I agree that the approach of Lord Phillips, Lord Hope and Lord Judge in *Adams* is to be preferred to the majority approach in *Allen v UK.* But I do not consider that it is for this court to decline to follow the majority view expressed in *Allen v UK.* The majority judgment was a carefully considered rejection of the Government's submission that section 133 was a *lex specialis* to which article 6(2) did not apply. The court also considered at para 41 (and clearly rejected) the reasons given by Hughes LJ in *Allen* in the Court of Appeal for holding that article 6(2) did not apply.

32. *Allen v UK* was clearly intended to set out an authoritative exposition of the applicability of article 6(2) in this area of ECHR law. Indeed, it has been so treated by the ECtHR in subsequent cases. In *Adams v United Kingdom* (Application No.70601/11) 12 November 2013, Mr Adams brought his complaint that section 133 was not consistent with the presumption of innocence to the ECtHR. At para 35, the Fourth Section of the court said that it was satisfied "for the reasons given [by the Grand Chamber] in *Allen* that the necessary link between the concluded criminal proceedings and the section 133 proceedings existed. Article 6(2) was accordingly applicable to the latter proceedings".

33. Article 6(2) has been applied in other post-*Allen v UK* cases such as *K.F v UK* (Application No. 30178/09), 3 September 2013; *A.L.F v UK* (Application No. 5908/12), 12 November 2013; *Vella v Malta* (Application No. 69122/10), 10 February 2014; and *Muller v Germany* (Application No. 54963/08), 27 March 2014.

34. For all these reasons, I would hold that the line of Strasbourg jurisprudence (in particular the authoritative decision of the Grand Chamber in *Allen v UK),* that article

6(2) applies to claims for compensation following the quashing of convictions is so clear and constant that this court should follow it. I reach this conclusion with some misgivings because I am persuaded by the reasoning of the majority of the Supreme Court in *Adams* and the strictures of the Supreme Court in *Gale* that article 6(2) has no application in such cases.

IS SECTION 133 (AS AMENDED) INCOMPATIBLE WITH ARTICLE 6(2)?

35. In what follows, I shall refer to "section 133 (as amended)" simply as "section 133". The appellants' case is that section 133 is incompatible with article 6(2) because it requires an applicant for compensation to prove his innocence and thereby necessarily call into question the correctness of the acquittal.

36. In order to examine this submission, it is necessary to return to the Grand Chamber decision in *Allen v UK*. Having considered some of the ECtHR's jurisprudence, the court said:

> "125. It emerges from the above examination of the Court's case-law under Article 6 § 2 that there is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings which follow the conclusion of criminal proceedings. As illustrated by the Court's existing case-law, much will depend on the nature and context of the proceedings in which the impugned decision was adopted.
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> 126. In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 (see, for example, *Y.*, cited above, §§ 43-46; *O.*, cited above, §§ 39-40; *Hammern*, cited above, §§ 47-48; *Baars*, cited above, §§ 29-31; *Reeves*, cited above; *Panteleyenko*, cited above, § 70; *Grabchuk*, cited above, § 45; and *Konstas v. Greece*, no. 53466/07, § 34, 24 May 2011). Thus in a case where the domestic court held that it was "clearly probable" that the applicant had "committed the offences ... with which he was charged", the Court found that it had overstepped the bounds of the civil forum and had thereby cast doubt on the correctness of the acquittal (see *Y.*, cited above, § 46; see also *Orr*, cited above, § 51; and *Diacenco*, cited above, § 64). Similarly, where the domestic court indicated that the criminal file contained enough evidence to establish that a criminal offence had been committed, the language used was found to have violated the presumption of innocence (see *Panteleyenko*, cited above, § 70). In cases where the Court's judgment expressly referred to the failure to dispel the suspicion of criminal guilt, a violation of Article 6 § 2 was established (see, for example, *Sekanina*, cited above, §§ 29-30; and *Rushiti*, cited above, §§ 30-31). However, when regard is had to the nature and context of the particular proceedings, even the use of some unfortunate language may not be decisive

> (see paragraph 125 above). The Court's case-law provides some examples of instances where no violation of Article 6 § 2 has been found even though the language used by domestic authorities and courts was criticised (see *Reeves*, cited above; and *A.L.*, cited above, §§ 38-39)".

37. The court then went on to consider whether the applicant's right to be presumed innocent was respected in that case. It noted at para 127 that the CACD had quashed the applicant's conviction because new evidence might have affected the jury's decision (i.e. it was a category 3 case). The court continued:

> "128. It is also important to draw attention to the fact that section 133 of the 1988 Act required that specified criteria be met before any right to compensation arose. These criteria were, put concisely, that the claimant had previously been convicted; that she had suffered punishment as a result; that an appeal had been allowed out of time; and that the ground for allowing the appeal was that a new fact showed beyond reasonable doubt that there had been a miscarriage of justice. The criteria reflect, with only minor linguistic changes, the provisions of Article 3 of Protocol No. 7 to the Convention, which must be capable of being read in a manner which is compatible with Article 6 § 2. The Court is accordingly satisfied that there is nothing in these criteria themselves which calls into question the innocence of an acquitted person, and that the legislation itself did not require any assessment of the applicant's criminal guilt.
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> 129. The Court further observes that the possibility for compensation following acquittal in the respondent State is significantly limited by the section 133 criteria. It is clear that an acquittal in the course of an appeal within time would not give rise to any right to compensation under section 133. Similarly, an acquittal on appeal based on inadequate jury directions or the admission of unfair evidence would not satisfy the criteria set out in section 133 of the 1988 Act. It was for the domestic courts to interpret the legislation in order to give effect to the will of the legislature and in doing so they were entitled to conclude that more than an acquittal was required in order for a "miscarriage of justice" to be established, provided always that they did not call into question the applicant's innocence. The Court is not therefore concerned with the differing interpretations given to that term by the judges in the House of Lords in *Mullen* and, after the judgment of the Court of Appeal in the present case, by the judges in the Supreme Court in *Adams*. What the Court has to assess is whether, having regard to the nature of the task that the domestic courts were required to carry out, and in the context of the judgment quashing the applicant's conviction (see paragraph 127 above),

the language they employed was compatible with the presumption of innocence guaranteed by Article 6 § 2.

……..

133. It is true that in discussing whether the facts of the applicant's case fell within the meaning of "miscarriage of justice", both the High Court and the Court of Appeal referred to the contrasting interpretations given to that phrase by Lords Bingham and Steyn in the House of Lords in *R (Mullen)*. As Lord Steyn had expressed the view that a miscarriage of justice would only arise where innocence had been established beyond reasonable doubt, there was necessarily some discussion of the matter of innocence and the extent to which a judgment of the CACD quashing a conviction generally demonstrates innocence. Reference was made in this regard to the Explanatory Report to Protocol 7, which explains that the intention of Article 3 of that Protocol was to oblige States to provide compensation only where there was an acknowledgement that the person concerned was "clearly innocent" (see paragraph 72 above). It is wholly understandable that when seeking to identify the meaning of an ambiguous legislative notion such as "miscarriage of justice" that has its origins in provisions figuring in international instruments - in the event, Article 14(6) of the ICCPR and Article 3 of Protocol No. 7 - national judges should refer to the international case-law on those provisions and to their drafting history setting out the understanding of their drafters. However, the Explanatory Report itself provides that, although intended to facilitate the understanding of the provisions contained in the Protocol, it does not constitute an authoritative interpretation of the text (see paragraph 71 above). Its references to the need to demonstrate innocence must now be considered to have been overtaken by the Court's intervening case-law on Article 6 § 2. <u>But what is important above all is that the judgments of the High Court and the Court of Appeal did not require the applicant to satisfy Lord Steyn's test of demonstrating her innocence</u>. The High Court in particular emphasised that the facts of *R (Mullen)* were far removed from those of the applicant's case and that the *ratio decidendi* of the decision in *R (Mullen)* did not assist in the resolution of her case (see paragraph 27 above).(emphasis added)

134. The Court does not consider that the language used by the domestic courts, when considered in the context of the exercise which they were required to undertake, can be said to have undermined the applicant's acquittal or to have treated her in a manner inconsistent with her innocence. The courts directed themselves, as they were required to do under section 133, to the need to establish whether there was a "miscarriage of

> justice". In assessing whether a "miscarriage of justice" had arisen, the courts did not comment on whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, they did not comment on whether the evidence was indicative of the applicant's guilt or innocence. They merely acknowledged the conclusions of the CACD, which itself was addressing the historical question whether, had the new evidence been available prior to or during the trial, there would nonetheless have been a case for the applicant to answer. They consistently repeated that it would have been for a jury to assess the new evidence, had a retrial been ordered (see paragraphs 31, 33 and 38-39 above)".

The appellants' submissions

38. Miss Williams submits that the reason why in *Allen v UK* the Grand Chamber focused on the language used by the courts when deciding whether to award compensation was not because the statutory test was irrelevant. It was because the applicant had conceded that the category 2 test defined in *Adams* did not offend the presumption of innocence. The applicant's complaint was about the words used, not the test itself. Despite the concession, the court considered whether the unamended section 133 criteria infringed article 6(2) and decided that they did not. That was because the applicant only had to satisfy the broader category 2 test. She did not have to prove her innocence. That is why the Grand Chamber concluded at para 128 that there was nothing in the statutory criteria themselves which called into question the innocence of the acquitted person. It is implicit in this reasoning that legislative criteria could themselves be incompatible with article 6(2).

39. In *Allen v UK*, the applicant's conviction was quashed merely on the ground that new evidence *might* have affected the jury's decision. There was no implication in the quashing of the conviction by the CACD that there was no case for the applicant to answer. Despite the quashing of the conviction, there was "powerful evidence" against her. Section 133 (as amended) requires the Secretary of State to voice suspicions about the applicant's innocence if he is to refuse compensation. He must in substance decide whether the applicant is innocent or not. Requiring a person to prove that he is innocent implies that the state regards him as guilty; all the more so if the application is rejected on the grounds that he is not innocent.

40. In rejecting these submissions, Burnett LJ said the following:

> "49. The language [of section 133 (1ZA)] demonstrates, in my view, that section 133 does not require the applicant for compensation to prove his innocence. It is the link between the new fact and the applicant's innocence of which the Secretary of State must be satisfied before he is required to pay compensation under the 1988 Act, not his innocence in a wider or general sense. I do not consider there is any practical distinction between "innocence" and "did not commit the offence" for these purposes. The case of Mr Hallam well illustrates the difference between proof of innocence in a

> general sense and that a new fact proves (or does not prove) innocence. His conviction rested upon the identification evidence of two witnesses. He had an alibi which the Crown suggested was false and in respect of which they said he was lying. The alleged lie relating to his alibi was relied upon by the prosecution to augment the identification evidence, which on its own would have been inadequate to support a conviction. The new evidence did not prove that his alibi was true and that he could not have been at the scene of the crime. It did not prove that the identification evidence was wrong. However, it provided cogent evidence to suggest that there may have been an innocent explanation for his being mistaken about where he was at the time of the crime. By contrast, if the new fact had established (to the necessary standard) that he could not have been at the scene of the crime, for example because he was in a different country or city, it would have established that he did not commit the crime. Similarly, there have been examples of cases with new DNA analysis which has shown beyond doubt that the convicted person could not have committed the crime in question.
>
> 50. The statutory scheme maintains the presumption of innocence, which is not impugned, but provides compensation if the Secretary of State is satisfied that the new fact conclusively proves innocence. The refusal of compensation on the basis that the statutory criteria are not established does not carry with it the implication that the person concerned is in fact guilty. I respectfully agree with Lord Phillips' comment that "on no view does the section make the right to compensation conditional on proof of innocence by the claimant" whatever the meaning of miscarriage of justice. In my judgment, the first of the propositions I have identified is not sustainable."

41. Miss Williams submits that this conclusion of the Divisional Court was wrong for the following reasons. First, she relies on the passage in para 133 of *Allen v UK* that I have underlined at para 37 above. She submits that the plain implication of this passage is that, if the applicant is required to demonstrate her innocence in order to be eligible under section 133 (as Lord Steyn's test required), that would be incompatible with article 6(2). Section 133 requires the applicant to demonstrate just that. The reference to Lord Steyn's test in *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1 is to a test which the Grand Chamber understood to be that the new or newly discovered fact shows conclusively that the applicant was innocent: see paras 40, 49 and 60-61 of its judgment. There is no basis for finding, as the Divisional Court suggested at para 53, that the Grand Chamber's clearly expressed view in para 133 that Lord Steyn's test would infringe the presumption of innocence, was based on a failure to appreciate the significance of the requirement that the miscarriage of justice be shown by the new or newly discovered fact.

42. Secondly, it would not be appropriate for a domestic court to depart from *Allen v UK* merely because it thought that it was wrong. It is clear that a requirement in section 133 that the applicant prove his innocence would violate article 6(2). The decision in *Allen v UK* is supported by detailed reasons and a thorough analysis of relevant authorities. Miss Williams refers, for example, to *O v Norway* (Application No 29327/95), 11 February 2003. This was one of the cases to which the Grand Chamber referred at para 126 of *Allen v UK*. In *O v Norway*, the Norwegian court decided not to award the applicant compensation because the statutory criterion that "it is probable that he did not carry out the act which formed the basis of the charge" was not met. The ECtHR held that this violated article 6(2) because it "clearly amounted to the voicing of suspicion against the applicant" (para 39). In *Capeau v Belgium* (Application No. 42914/98), 13 January 2005, the domestic legislation in issue required a person seeking compensation as a result of pre-trial detention to satisfy one of several criteria including that:

> "…. after being discharged through an order or judgment discontinuing the proceedings he establishes his innocence by adducing factual evidence or submitting legal argument to that effect".

43. Thirdly, Miss Williams submits that the Divisional Court's approach is in any event wrong. For an applicant to satisfy the Secretary of State that the new fact shows beyond reasonable doubt that he was innocent, he must show that he was innocent. The objective (proving that something did not happen) and the standard of proof remain the same, even if the means of establishing it are restricted. The applicant must still prove his innocence "in a general or wider sense" even if the focus is on the new fact. Whether an applicant is required to prove his innocence using a new fact, or pre-existing facts, he must in any event prove his innocence. Any consideration of whether a new or newly discovered fact shows that the person did not commit the offence will necessarily involve an examination of its significance in the context of the other available evidence. For example, if other evidence existed which tended to undermine the impact of the new fact, it would be permissible to have regard to the other evidence in deciding whether the new fact shows beyond reasonable doubt that the person did not commit the offence.

44. Miss Williams submits that the example given by Burnett LJ at para 49 of his judgment does no more than illustrate the distinction between the category 2 and category 1 tests in *Adams.* In the situation postulated by Burnett LJ, where a new fact showed that Mr Hallam could not have been at the scene of the crime, he would establish that he was both innocent in a section 133 sense and innocent in a general sense. There is no sensible distinction between the two.

Discussion of the incompatibility issue

45. I do not accept that section 133 is incompatible with article 6(2) substantially for the reasons given by the Divisional Court and those advanced by Mr Strachan.

46. In determining whether a decision refusing compensation following the quashing of a conviction violates article 6(2), the approach of the ECtHR is to focus on the language that is used by the decision-maker: see, for example, *Allen v UK* at para 128. If the language in which the decision is couched voices suspicion about the innocence of the

person whose conviction has been quashed, that will amount to a breach of article 6(2). In *Allen v UK* itself, the ECtHR rejected the submission that, in applying the section 133 criteria, the High Court and the Court of Appeal had commented on whether the evidence was indicative of the applicant's guilt or innocence. At para 135, the court said:

> "They did not question the CACD's conclusion that the conviction was unsafe; nor did they suggest that the CACD had erred in its assessment of the evidence before it. They accepted at face value the findings of the CACD and drew on them, without any modification or re-evaluation, in order to decide whether the section 133 criteria were satisfied."

47. I accept that, if section 133 *required* the Secretary of State to voice doubts or suspicion on the innocence of the applicant, then it would be regarded as incompatible with article 6(2) according to the Strasbourg jurisprudence.

48. The critical reason why section 133 is not incompatible with article 6(2) is that, as the Divisional Court said, it does not require the applicant to prove his innocence *generally*. The key issue for the purpose of establishing eligibility for compensation under section 133 is the effect of the new or newly discovered fact which led to the conviction being quashed on appeal. This is the point that Lord Phillips made at para 58 of *Adams.* As Mr Strachan submits, section 133 simply sets out a statutory basis for the payment of compensation in certain cases where a conviction is quashed out of time by reason of a new or newly discovered fact. The statute assumes that the Secretary of State proceeds on the basis that the applicant has been acquitted of the offence and is entitled to be treated as innocent in consequence. The Secretary of State is only required to look at whether the new or newly discovered fact (and nothing else) shows beyond reasonable doubt that the person did not commit the offence.

49. The essential meaning and effect of section 133 was well explained by Sir Thomas Bingham MR in *R v Secretary of State for the Home Department ex p Bateman* (1994) 7 Admin LR 175. This was a pre-HRA case in which the applicant challenged the refusal by the Secretary of State to grant compensation under section 133 following the quashing of his convictions by the CACD. The applicant submitted that a denial of compensation undermined his acquittal and the presumption of innocence which flows from the fact that his convictions had been quashed. In rejecting this submission, the Master of the Rolls said at p 182 that he had no intention to undermine the effect of the quashing of the convictions. He continued:

> "He is entitled to be treated, for all purposes, as if he had never been convicted. Nor do I wish to suggest that Mr Bateman is not the victim of what the man in the street would regard as a miscarriage of justice. He has been imprisoned for three-and-a-half years when he should not have been convicted or imprisoned at all…..But that is not, in my judgment, the question. The question is whether the miscarriage of justice from which Mr Bateman has suffered is one that has the characteristics which the Act lays down as a pre-condition of the statutory right to demand compensation."

50. The statutory focus of section 133 in both its original and amended versions is on the effect of the new or newly discovered fact and nothing else. This focus is central to the underlying objects of limiting eligibility of compensation to a narrower category of cases than the entire corpus of cases where a conviction has been quashed. The intention is that it should be restricted to cases where some new or newly discovered fact emerges. The focus on the effect of that new or newly discovered fact (rather than on whether the person can demonstrate innocence *generally*) is central to the operation of section 133. The fact that the Secretary of State is not persuaded beyond reasonable doubt by a new or newly discovered fact that an applicant is innocent does not entail that the Secretary of State casts doubt on his innocence generally. He is merely saying that the applicant's innocence has not been proved *by the new or newly discovered fact.* In *R (on the application of Andukwa) v Secretary of State for Justice* [2014] EWHC 3988 (Admin), the applicant pleaded guilty to an offence in respect of which he had an available statutory defence which, if it had succeeded, would have meant that he was innocent beyond reasonable doubt. But he was not entitled to compensation under section 133 because he was unable to prove his innocence on the basis of a new or newly discovered fact. Cases such as *Andukwa* demonstrate that a refusal of compensation under section 133 does not cast doubt on the quashing of a conviction or otherwise undermine the presumption of innocence.

51. Lord Hope noted in his analysis in *Adams* at para 98 that category 2 itself was a narrow category. He said:

> "The range of cases that will fall into the category that I have just described is limited by the requirement that directs attention only to the evidence which was the basis for the conviction and asks whether the new or newly discovered fact has completely undermined that evidence. It is limited also by the fact that the new or newly discovered fact must be *the* reason for reversing the conviction. This suggests that it must be the sole reason, but I do not see the fact that the appellate court may have given several reasons for reversing the conviction as presenting a difficulty. All the other reasons that it has given will have to be disregarded. The question will be whether the new or newly discovered fact, taken by itself, was enough to show conclusively that there was a miscarriage of justice because no conviction could possibly have been based on the evidence which was used to obtain it."

52. Section 133 is, therefore, concerned with the operation of the new or newly discovered fact, not with the general ability of a person to prove his innocence. That innocence is presumed in all cases where a person is applying for compensation (the conviction having been quashed).

53. I accept the submission of Mr Strachan that the weight that Miss Williams places on the sentence in para 133 of *Allen* that I have underlined is unwarranted. The Grand Chamber's observation at para 133 was directed at the dangers of imposing a general test of having to demonstrate innocence *per se* which, as I have said, is not what is required by section 133.

54. None of the other authorities on which Miss Williams relies supports her submission that section 133 is incompatible with article 6(2). Thus, in *Capeau* the legislation placed the burden on the applicant for compensation to "establish his innocence" *generally* by adducing evidence and/or legal argument. It is of significance that the court said that article 6(2) does not give a person charged with a criminal offence a right to compensation for unlawful detention on remand where proceedings against him are discontinued (para 23). It added: "Merely refusing compensation does not therefore in itself infringe the presumption of innocence". As explained in para 24, the court was therefore required to look at the language used in refusing compensation and to determine whether the Pre-Trial Detentions Appeals Board "through the way it conducted its business, the reasons it gave for its decision or the language in which it set out its reasoning, allowed doubt to be cast on the presumption of the applicant's innocence, when he had not been proved guilty according to law".

55. The Norwegian legislation considered in *O v Norway* provides for compensation where a person has been acquitted. The ECtHR reiterated at para 39 that article 6(2) embodies a general rule that, following a final acquittal, "even the voicing of suspicions regarding an accused's innocence is no longer admissible." In refusing the application for compensation, the High Court did not find it to have been shown that the applicant did not engage in sexual intercourse with the victim. The ECtHR held that this reasoning amounted to the voicing of suspicion against the applicant regarding the charges on which he had been acquitted. Accordingly, there had been a violation of article 6(2). Once again, the focus of the decision was on the language used.

56. Nor do the post-*Allen v UK* authorities support Miss Williams's case. In *Adams v UK*, the ECtHR had to consider whether section 133 was compatible with article 6(2). At para 39, the court referred to para 128 of *Allen v UK* and said that there was nothing in the section 133 criteria "which calls into question the innocence of an acquitted person and the legislation itself does not require any assessment of the applicant's criminal guilt".

57. In *K.F. v UK*, the ECtHR again followed and applied *Allen v UK*. At para 27, the court again referred to para 128 of *Allen* and said, in relation to section 133, that it was for the domestic courts to interpret the legislation and they were entitled to conclude that more than an acquittal was required for a "miscarriage of justice" to be established "provided always that they did not call into question the applicant's innocence". The question was, therefore, whether the language employed in the compensation decision was compatible with the presumption of innocence. In *A.L.F. v UK*, yet again the ECtHR followed and applied *Allen v UK*. This was another section 133 case in which there was a challenge to the compatibility of section 133 with article 6(2). Yet again the court rejected this challenge by reference to para 128 of *Allen v UK*.

58. For all these reasons, I would therefore hold that section 133 is not incompatible with article 6(2). The section 133 criteria do not cast doubt on the innocence of an applicant whose conviction has been quashed.

MR NEALON'S PUBLIC LAW CHALLENGE

59. Mr Nealon seeks permission to appeal against the Divisional Court's dismissal of his application for judicial review of the Secretary of State's decision to refuse his application for compensation.

60. The Secretary of State's decision was set out in his letter of 12 June 2014. The letter recorded that Mr Nealon's application and further submissions had been received and considered. The letter set out the statutory test to be applied under section 133. It stated that, on the basis of the information available, the Secretary of State had concluded that Mr Nealon had not suffered a miscarriage of justice as defined in section 133. It referred to the reasons given by the CACD for quashing the conviction and the Court's comments on the nature and significance of the new DNA evidence. It stated that that evidence did not "undoubtedly belong to the attacker" and explained why that was so by reference to the prosecution expert evidence at the appeal and the CACD's findings in relation to the new evidence.

61. Mr Stanbury challenges the decision on the following main grounds:

(1) It did not adequately engage with the experts' reports;

(2) It did not consider the probability of an innocent explanation for the unknown male's DNA; and

(3) It failed to properly apply the standard of proof and imposed an artificially high threshold requiring scientific proof.

62. Mr Stanbury further submitted that the application raises important questions as to the proper approach to be adopted when applying the new test under section 133 (1ZA). He contends that this requires a full and proper review of the evidence because the Secretary of State has to decide for himself whether the new facts show that the applicant is innocent.

63. In dismissing the application, Burnett LJ observed that the question of what is a relevant consideration for the purposes of a decision under section 133 is not defined in the statute and that it is a matter for the decision maker to determine; that there is nothing in the decision letter which suggests that the Secretary of State misunderstood the standard of proof; and that there was nothing legally objectionable in the way in which the decision was expressed. I agree with these observations.

64. Burnett LJ also stated at para 60 that he did not accept that:

> "…the Secretary of State was obliged, as a matter of law, to undertake his own detailed analysis of the evidence or to evaluate for himself the chances that the unknown male was not the attacker".

65. This part of the decision is criticised by Mr Stanbury. He submits that Burnett LJ was there saying that in applications for compensation there is no need to look beyond the judgment of the CACD, to consider the underlying evidence or to make an independent evaluation. As he points out, it is clear from the Supreme Court decision in *Adams* that the Secretary of State has to form his own conclusion as to whether

section 133 is satisfied – see, for example, Lord Phillips at para 36 and Lord Kerr at para 169.

66. In my judgment Mr Stanbury's submission is based on a misreading of the judgment. Burnett LJ was simply stating that there was no legal requirement in this case for the Secretary of State to carry out a "detailed" analysis of the evidence or to evaluate the specific evidential issue identified. It is also clear from the references made in the decision to the evidence and to Mr Nealon's submissions that the Secretary of State did not simply consider the CACD judgment.

67. The evidence which the Secretary of State needs to be consider and the evaluative exercise which he has to perform for the purpose of making his statutory determination will vary from case to case. The applicant has the opportunity to identify and to make submissions on the material upon which he relies, as was done in this case. There is no basis for saying that the approach taken by the Secretary of State in this case involves any error of law.

68. I also do not accept the submission that the introduction of section 133 (1ZA) has made some fundamental change to the nature of the exercise which the Secretary of State has to perform. The criteria to be applied have changed but the essential nature of the exercise to be performed remains the same.

69. For all these reasons, and those given by the Divisional Court, I would refuse Mr Nealon's application for permission to appeal so as to raise the public law challenge.

OVERALL CONCLUSION ON THE APPEALS

70. I would, therefore, dismiss the appeals of both appellants. The question remains whether we should give permission to appeal to the Supreme Court so that the issue of whether article 6(2) applies at all in these cases can be resolved. I would leave that decision to the Supreme Court itself because (i) the line of Strasbourg case law on the applicability issue is so clear that there can be no doubt as to what the view of the ECtHR would be on the applicability of article 6(2) to section 133; and (ii) it is clear that, for the reasons that I have given, section 133 is compatible with article 6(2).

Sir Brian Leveson, President of the Queen's Bench Division:

71. I agree.

Lord Justice Hamblen:

72. I also agree.

Annex

The Facts

Sam Hallam

3. Sam Hallam was convicted of the murder on 11 October 2004 of Essayas Kassahun in London. His conviction substantially rested upon the identification evidence of two witnesses, Miss Henville and Mr Khelfa. Mr Hallam provided an alibi which the prosecution said was a deliberate fabrication. His defence was that he was not at the scene of the murder. The person with whom he said he was at the time of the killing, Mr Harrington, did not support the alibi and denied having seen Mr Hallam at all in the days either side of the murder. In those circumstances, if the jury were satisfied that Mr Hallam had lied about his alibi (rather than being mistaken) they could rely upon that lie as providing support for the identification evidence. Mr Hallam's first appeal against conviction was dismissed by the CACD on 22 March 2007.

4. In July 2011 the case was referred back to the CACD on the grounds that new evidence cast doubt upon the identification evidence and also upon Mr Harrington's evidence that he had not been with Mr Hallam at all in the days surrounding the killing. The principal grounds were, first, that the identification witnesses had heard rumours that "Sam" had been involved in the killing. In the unused material there was information from Gary Rees that a different "Sam" was the subject of the rumour. Their identification evidence may have been influenced by the rumours. Secondly, a mobile telephone had been seized from Mr Hallam on his arrest but it was not examined at the time of his prosecution. Timed photographs on the telephone suggested that both Mr Hallam's recollection and that of Mr Harrington relating to the alibi were faulty and that the alibi may not have been fabricated. The photographs did not establish where Mr Hallam was at the relevant time.

5. The prosecution did not seek to uphold the conviction or seek a retrial. In giving the judgment of the CACD, [2012] EWCA Crim 1158, Hallett LJ summarised the position:

> "[77] In our judgment the following summary encapsulates this appeal. The case against the appellant depended on the visual identification evidence of two witnesses, neither whom said anything in his or her initial statements to the police to indicate that they recognised the appellant (whom they knew) or anyone like him at the scene of the crime. Miss Henville's identification of the appellant was prompted by her friend. Mr Khelfa's identification of the appellant was prompted by Miss Henville. Neither was a particularly satisfactory witness. Their various accounts contained numerous internal inconsistencies and contradictions, and were contradicted by other evidence. Mr Khelfa's identification provided little, if any, independent support for Miss Henville's. The information in relation to the messages from Gary Rees raises the possibility of greater collusion (in the sense of discussion) between the witnesses than the defence team knew at the time. It also potentially puts paid to Miss Henville's assertion that from the outset there were rumours that Sam Hallam was involved. In any event, the purported recognition or identification of the appellant took place in very difficult circumstances. It amounted to little more than a fleeting glimpse. Thus, even if the witnesses had remained rock solid, consistent with each other and with

> the evidence of other witnesses, there was scope for a case of mistaken identity. Proper independent supporting evidence was essential on the facts here.
>
> [78] We now know there is the real possibility that the appellant's failed alibi was consistent with faulty recollection and a dysfunctional lifestyle, and that it was not a deliberate lie. The proper support to the Crown's case has fallen away.
>
> [79] Finally, there is the point (not spotted by anyone before these proceedings) that the jury may not have appreciated that they were free to rely upon the potentially exculpatory evidence of Bissett.
>
> [80] In our judgment, the cumulative effect of these factors is enough to undermine the safety of these convictions. In those circumstances, it is not necessary to consider further the alleged failures in disclosure in investigation (which to our mind were nowhere near as extensive as Mr Blaxland asserted) nor the so-called positive evidence from witnesses who knew the appellant who say that he was not at the scene of the crime. However compelling they may have been, we doubt they could ever have established, as Mr Blaxland asserted, positive evidence that the appellant was not at the scene, albeit we accept that they may have established that, like so many others, two more witnesses did not see the appellant at the incident."

6. In para 49 Hallett LJ recorded that Mr Blaxland QC, who appeared for Mr Hallam in the appeal, had sought from the court a positive statement that the evidence showed Mr Hallam to be innocent. The CACD declined to make such a statement, whilst accepting that it could do so in an appropriate case.

7. The decision letter dated 14 August 2014 took a point that the failure to deploy the mobile telephone evidence at the trial was, at least in part, attributable to Mr Hallam. That was contested in subsequent correspondence and was not maintained as a reason for refusing compensation. The effective reason for refusal was explained as follows:

> "In any event, the Secretary of State does not consider that the new evidence before the Court shows beyond reasonable doubt that Mr Hallam did not commit the offence. The CA concluded that the new evidence potentially placed your client away from the murder scene by showing your client with another person in the early evening of 11 October, and cast doubt on the concept that your client had deliberately created a false alibi for his whereabouts on the night of the murder. The CA view was that the cumulative effect of these factors was enough to undermine the safety of your client's convictions which were quashed on that basis. However, the fresh evidence does not establish positively that your client was not at the murder scene on 11 October 2004. Indeed, the Court of Appeal found that it 'cannot establish a positive alibi for the night in question' (para 69). In all circumstances, the Secretary of State does not consider that this is a case that meets the statutory test for compensation under section 133 of the 1988 Act.

> We further note in this regard that, whilst the Court of Appeal quashed Mr Hallam's convictions on the basis that they were unsafe, it expressly declined the invitation of Mr Hallam's counsel to exercise its discretionary power (as identified by Lord Judge in *Adams* [2011] UKSC 18) to state that the new evidence demonstrated 'the factual innocence of the appellant'."
>
> The letter concluded with this:
>
> "It is important to emphasise that nothing in this letter is intended to undermine, qualify or cast doubt on the decision of the CA to quash your client's convictions. Mr Hallam is presumed to be and remains innocent of the charges. His application has been rejected as it does not meet the statutory test for compensation under section 133 of the 1988 Act."

Victor Nealon

8. On 22 January 1997 Victor Nealon was convicted at Swansea Crown Court of attempted rape. He was sentenced to life imprisonment with a minimum term of seven years. His first appeal against conviction was dismissed by the CACD on 27 January 1998. His conviction rested upon identification evidence. In July 2012 his case was referred to the CACD by the CCRC in the light of DNA evidence resulting from tests carried out upon the victim's clothing. No such tests were carried out at the time of the attack. The effect of the evidence was:

    i) A sample taken from the lower right front of the victim's blouse produced a full male DNA profile from what was probably a saliva stain. This was not Mr Nealon's DNA. It was from an "unknown male".

    ii) Further stains were detected on the right and left cups of the victim's bra which were probably saliva. There was also other DNA material from the inside and outside of the bra. There was no scientific support to suggest that the DNA was Mr Nealon's.

    iii) Orla Sower, a forensic scientist who had been instructed on behalf of Mr Nealon, said there was "a high degree of similarity" between what she found on the bra and the DNA of the unknown male. Dr Tim Clayton, instructed on behalf of the prosecution, considered that the unknown male may have been a contributor to that material. Rachel Morgan, of the Forensic Science Service, was instructed to review Orla Sower's work and suggested that there were consistencies between the samples from the blouse and from the bra.

    iv) Complex mixtures of DNA were recovered from the victim's tights and skirt, each with at least three contributing individuals, of whom at least one was an unknown female. Whilst Mr Nealon shared some of the DNA components found in the mixed profile so too did a large proportion of the population. The failure to eliminate him from these samples had little significance.

9. The evidence of the victim at the time of the attack was that the man who attacked her "mauled" her, tried to kiss her and put his hand inside her blouse over her bra. He was pulling at her tights and underwear. She recognised the man as someone who had been outside the night club she had visited that evening. He had a lump or scratch on his forehead. There was much investigation at trial of various injuries suffered by Mr Nealon which could have resulted in a lump on his forehead. The evidence was inconclusive.

10. The victim was re-interviewed in connection with the new investigation. Her recollection was that she had bought the blouse and bra either on the day of the attack or a day or two before. DNA tests excluded the possibility that her partner at the time, eight officers involved in the investigation, four men who arrived at the scene of the attack shortly after it had occurred and the scientist involved in the original investigation, was the unknown male.

11. At his second appeal, Mr Nealon relied upon the new DNA evidence in the context of what Mr Wilcock QC suggested on his behalf was "unsatisfactory identification evidence". The prosecution opposed the appeal on the grounds that the attacker may well not have left any detectable DNA, relying on Dr Clayton's opinion that the DNA from the unknown male may not be crime related; that there was evidence of DNA from an unknown female and also that the victim had given evidence that in the course of the evening she would have hugged and kissed "lots of men" because it was her birthday.

12. The judgment of the CACD, [2014] EWCA Crim 574, was given by Fulford LJ. There are two versions publically available with different paragraph numbers. I quote from the version available on Bailii. At para 31 he recorded that counsel for Mr Nealon:

> "accepts that it is plausible that the perpetrator left little or no DNA on Ms E and that the DNA could have been deposited on the garments before Ms E wore them (as Dr Clayton has opined …)"

The central reasoning of the CACD is found between paras 34 and 36 of his judgment:

> "[34] The real, indeed the only, question on this appeal is the impact of the fresh DNA evidence, which we admit pursuant to section 23 Criminal Appeal Act 1968 given we are of the view that it is necessary and expedient to receive this expert evidence in the interests of justice. It is clear that unlike the situation in Hodgson the fresh evidence has not "demolished" the prosecution case. But its effect on the safety of this conviction is substantial. We are clear in our view that if the jury had heard that in addition to the weaknesses in the identification evidence, it was a real possibility that DNA from a single "unknown male" had been found in some of the key places where the attacker had "mauled" the victim (in particular, the probable saliva stain on the lower right front of Ms E's blouse and probable saliva stains on the right and left cups of Ms E's brassiere) this could well have led to the appellant's acquittal. The relevant items of clothing had been bought recently (possibly from different shops); they may have been carried in different bags; and the police officers who attended the scene, the deceased's boyfriend and the scientists were all excluded as the source of the unknown DNA. Therefore, every sensible enquiry that could be made to identify a possible innocent source of the DNA has been made. It follows that the jury

> may reasonably have reached the conclusion, based on the DNA evidence, that it was a real possibility that the "unknown male" – and not the appellant – was the attacker.
>
> [35] We stress, therefore, that the effect of this material is to call into question the safety of the conviction because it might reasonably have led the jury to reach a different verdict (R v Pendleton [2001] UKHL 66; [2001] 1 Cr App R 34,page 441 at paragraph 19). While Miss Whitehouse's submissions as to why the jury would have been entitled to reject the possibility that the "unknown male" was responsible for the attack provide a dimension to the debate that requires serious consideration, we have no doubt that the effect of the new evidence is that the case may have resulted in an acquittal. Miss Whitehouse's arguments do not go so far as to provide a basis for suggesting that the jury would have undoubtedly have reached the same conclusion if they had heard the evidence.
>
> [36] We allowed the appeal and quashed the conviction at the end of the oral hearing. These are our reasons for that decision."

13. The decision letter in Mr Nealon's case is dated 12 June 2014. It contained a paragraph relating to the presumption of innocence in the same terms as I have quoted from the decision letter in Mr Hallam's case. The substance of the refusal was explained as follows:

> "However, on the basis of the information available, the Justice Secretary has concluded that your client has not suffered a miscarriage of justice as defined by section 133 of the 1988 Act. The Court of Appeal quashed your client's conviction on the basis that the introduction of new DNA material called into question the safety of that conviction. Although the new evidence shows that the DNA was from an "unknown male", this does not mean that it undoubtedly belonged to the attacker. Expert evidence for the prosecution at the appeal stated it was plausible that the attacker transferred little or no DNA from the victim's clothing during the commission of the offence, and that the DNA from the unknown male may not have been crime related. The Court of Appeal said that these arguments required 'serious consideration'. It also found that the original jury had been entitled to convict your client on the basis of the existing identification evidence (which was not at issue in the appeal). Whilst the Court of Appeal decided, ultimately, that the jury 'may reasonably have reached the conclusion, based on the DNA evidence, that it was a real possibility that the 'unknown male' – and not the applicant – was the attacker', the court was explicit that the fresh evidence did not 'demolish' the prosecution evidence.
>
> Having considered the judgment in the Court of Appeal, and your client's own submission, the Justice Secretary is not satisfied that your client's conviction was quashed on the ground that a new or newly discovered fact shows beyond reasonable doubt that your client did not commit the offence.
>
> Although the Crown Prosecution Service did not seek a retrial, the reasons for this included the circumstance of the case, the length of time of a retrial

which was not in the public interest and the fact that your client had already spent 17 years in prison."