Neutral Citation Number: [2015] EWHC 1565 (Admin)

Case No: CO/5272/2014 & CO/4240/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/06/2015

Before :

The Rt Hon Lord Justice Burnett
The Hon Mrs Justice Thirlwall

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Between :

R (on the application of Victor Nealon) **R (on the application of Sam Hallam)**	**Claimants**
- and -	
The Secretary of State for Justice	**Defendant**

- -

Heather Williams QC and Adam Straw (instructed by **Birnberg Peirce and Partners**) for **Sam Hallam**
Matthew Stanbury and Joseph Markus (instructed by **Quality Solicitors Jordans**) for **Victor Nealon**
James Strachan QC and Mathew Gullick (instructed by the Government Legal Department) for the **Defendant**

Hearing dates: 12 and 13 May 2015

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Approved Judgment

Lord Justice Burnett:

Introduction

1. Both claimants in these "rolled up" hearings of applications for permission to apply for judicial review 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 ["CCRC"]. The appeals were allowed. There is no connection between the claimants. Their cases have been listed together because they 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 ["the 2014 Act"]. Section 133(1) as originally enacted provided that: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."

The amendment introduced by the 2014 Act inserted a new section 133(1ZA) which defined "miscarriage of justice":

> "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 or, in a case where subsection 6H applies, Northern Ireland, if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly)."

2. Both claimants argue that section 133(1ZA) of the 1988 Act is incompatible with article 6(2) of the European Convention on Human Rights ["ECHR"] because it violates the presumption of innocence. We are invited to make a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998. Miss Williams QC developed a subsidiary argument that some form of declaratory relief should issue in the event that a declaration of incompatibility were made, to mark the fact that the decision in Mr Hallam's case was thus itself in conflict with article 6(2). However, since the Secretary of State was obliged to apply the statutory test, section 6 of the Human Rights Act 1998 confirms the legality of his actions in that regard. No further relief would be available. In Mr Nealon's case there is a subsidiary argument that the

decision of the Secretary of State to refuse compensation was, in any event, vitiated on ordinary public law principles.

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.
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> [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.
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> [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.
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> [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.
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> 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.
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> [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.
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> [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."

The Arguments in Outline

14. For the claimants, Miss Williams (for Mr Hallam) and Mr Stanbury (for Mr Nealon) submit that, properly understood, the judgment of the Grand Chamber of the Strasbourg Court in *Allen v. United Kingdom* 36 BHRC 1, decided on 12 July 2013, should impel us to the conclusion that section 133(1ZA) is incompatible with article 6(2). For the Secretary of State, Mr Strachan QC submits that the decision of the Supreme Court in *R (Adams) v. Secretary of State for Justice* [2012] 1 AC 48 is binding authority for the proposition that article 6(2) ECHR has no bearing on section 133 of the 1988 Act, and thus the one cannot be incompatible with the other, albeit that the court was there concerned with that provision before it was amended. The Supreme Court treated article 6(2) as an irrelevance. He readily accepts that the Grand Chamber of the Strasbourg Court took a different view in *Allen*. He reserves the Secretary of State's position to argue that the Grand Chamber reached an erroneous conclusion on that point. The reasoning of the domestic courts is to be preferred. That said, Mr Strachan submits that the decision in *Allen*, whilst supporting the proposition that article 6(2) is applicable to decisions pursuant to section 133, does not support the conclusion that section 133(1ZA) is incompatible with article 6(2) or that there has been any violation of the presumption of innocence in these cases.

The 1988 Act and Domestic Authority

15. Section 133 of the 1988 Act was the legislative response of the United Kingdom to its international obligations under article 14(6) of the International Covenant on Civil and Political Rights 1966 ["ICCPR"], ratified by this country in May 1976, to provide compensation in some circumstances for victims of miscarriages of justice. Before 1988 these international obligations had been reflected in an *ex gratia* scheme. Article 14(6) 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 the law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

16. It can be seen that the language of article 14(6) was followed closely in section 133. The term "miscarriage of justice" was not further defined in the 1988 Act; nor was it defined in the ICCPR. An almost identical provision is found in Article 3 of the Seventh Protocol of the ECHR ["A3P7"], introduced to bring the ECHR into line with the ICCPR in this regard. However the United Kingdom has not signed or ratified that additional provision.

17. The reach of the term "miscarriage of justice" in section 133 of the 1988 Act was considered by the House of Lords in *R (Mullen) v. Secretary of State for the Home Department* [2005] 1 AC 1. There was a difference of opinion amongst their Lordships as to that reach and, in particular, whether the term extended beyond those who, as a matter of fact, were clearly innocent. It was unnecessary to resolve the issue to determine that appeal because the appellant had been the victim of an abuse of executive power which none of their Lordships considered amounted to a miscarriage of justice for the purposes of section 133 of the 1988 Act. Lord Bingham hesitated to accept the submission of the Secretary of State that compensation was payable following acquittal satisfying the statutory conditions only if the applicant was shown to be innocent: para 9. By contrast Lord Steyn had concluded that the words "miscarriage of justice" extend only to those acknowledged to be clearly innocent: para 56. Neither in any way doubted the necessity of a link between the new fact and the "miscarriage of justice", clear as it is on the face of the statute. Lord Bingham's reference to "statutory conditions" encompassed that link.

18. The question whether a restricted meaning of "miscarriage of justice" would violate the presumption of innocence was the subject of submissions in *Mullen*. That is because article 6(2) ECHR has a precise analogue in article 14(2) ICCPR. Lord Bingham was unpersuaded by the argument that a narrow construction of "miscarriage of justice" would necessarily violate the presumption of innocence: see paras 10 and 11. Lord Steyn undertook a detailed analysis of the Strasbourg jurisprudence on the topic beginning at para 37. He concluded at para 44 that the

Strasbourg jurisprudence threw no light on the interpretation question in issue and that "the general provision of a presumption of innocence" did not have any impact on it. Article 14(6) was in a category of *lex specialis.*

What did Adams decide?

19. In *Adams* it was necessary for the Supreme Court to determine the reach of the term "miscarriage of justice" in the original section 133 of the 1988 Act. The court comprised nine justices. The cases of three individuals were before the court. The principal holdings with regard to the original section 133 were:

    i) That the true meaning of "miscarriage of justice" was not restricted to circumstances where the new fact provided conclusive proof of innocence. It also included cases where a new or newly discovered fact showed that the evidence against the convicted person had been so undermined that no conviction could possibly be based upon it. In the course of the judgments these were referred to as Category I and Category II respectively.

    ii) However, "miscarriage of justice" did not include circumstances where new evidence rendered a conviction unsafe in the sense that, had it been available at trial, a reasonable jury might or might not have convicted; or where something had gone seriously wrong with the investigation of the offence or the conduct of the trial, thereby resulting in the conviction of someone who should not have been convicted. These were referred to as Category III and Category IV (*Mullen* had been in Category IV).

20. The conclusion that "miscarriage of justice" included Category II and well as Category I cases was reached by a majority of five to four. The five in the majority were Lord Phillips, Lord Hope, Lord Kerr, Lord Clarke and Lady Hale. The four who concluded that the provision was concerned only with Category I cases were Lord Judge, Lord Rodger, Lord Walker and Lord Brown. The head note in the official law report records a further set of holdings by eight of the justices which includes:

> "… that while the presumption of innocence guaranteed by article 6.2 of the Convention prevented a state from undermining the effect of a criminal acquittal, the procedure enacted by section 133 of the 1988 Act providing for the decision on entitlement to compensation to be taken by the executive was separate and raised different questions from the proceedings in a criminal court, and the refusal of compensation on the basis that the claimant has not proved beyond reasonable doubt that a miscarriage of justice had occurred would not infringe article 6.2."

In support of that part of the holding reference is made to para 58 in the judgment of Lord Phillips, paras 108 to 111 in the judgment of Lord Hope, para 181 in the judgment of Lord Kerr, paras 230 to 235 in the judgment of Lord Clarke and paras 255 and 256 in the judgment of Lord Judge, with whom Lords Brown and Rodger agreed at para 282, and Lord Walker agreed at para 284.

21. Mr Strachan submits that the head note accurately distils one of the *rationes decidendi* of the case, which may be further condensed to the proposition that the presumption of innocence guaranteed by article 6(2) ECHR has no bearing on the interpretation or operation of section 133. That includes whether its scope should be restricted to circumstances where conclusive proof of innocence was shown to result from the newly discovered fact. He acknowledges that in including Lord Clarke in the majority in favour of this proposition, the writer of the head note erred. Lord Clarke expressed reservations about it. He concluded that even if the presumption of innocence were applicable to a decision under section 133, the formulation of the test he favoured would not infringe it.

22. Miss Williams (supported by Mr Stanbury) submits that whilst seven members of the court decided that article 6(2) was not relevant to the interpretation of section 133, the reasons given in support of that conclusion were not uniform. Three expressly adopted the *lex specialis* formulation of Lord Steyn in *Mullen*. Lord Judge did not use the words "*lex specialis*" but instead said that the article 6(2) cases on presumption of innocence did not "bear on the issues which arise in this litigation". She submits that the view expressed by Lord Judge and the three justices who agreed with him should be ignored because they formed the minority on the question of the reach of "miscarriage of justice". For either or both of these reasons, Miss Williams submits that we are not bound to hold, as a matter of domestic law, that section 133 (1ZA), is compatible with article 6(2).

23. We are sitting as a court of first instance. We are bound by the rules of precedent to follow decisions of the Court of Appeal and Supreme Court (or House of Lords). Even were we satisfied in the context of a decision on the meaning of the ECHR that the Strasbourg Court had clearly disagreed with the domestic courts by which we are bound, we are obliged to adhere to our rules of precedent: *Kay v. Lambeth London Borough Council* [2006] 2 AC 465 at para 43. All discussion of the rules of precedent is littered with Latin terms used for centuries by lawyers. We are bound only by the *ratio* or *rationes decidendi.* Those are the propositions of law which the judge concerned considered necessary for his decision. A definition is given in Cross and Harris, *Precedent in English Law 4th edition 1991* at page 72, which the authors describe as "tolerably accurate":

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him."

24. A case may have one, two or more *rationes decidendi*. A decision of an appellate court sitting with three or more judges may see different combinations of judges joining in agreement on the various propositions of law. Such a possibility is enhanced in cases in the Supreme Court sitting with seven or nine justices who then produce more than one majority and minority judgment.

25. I do not accept the submission that a legal proposition arrived at by different judges applying variable reasoning is thereby deprived of having binding effect if it is impossible to discover a majority that adheres to the same reasoning in stating a proposition of law. One illustration will suffice. In *Chaplin v. Boyes* [1971] AC 356 the question was whether English or Maltese law should govern the assessment of

damages in a case where a serving member of the Royal Air Force sued in England in respect of injuries sustained in a motor accident in Malta. The difference in what he might recover, both as to quantum and heads of damage, was marked. The five members of the Appellate Committee of the House of Lords decided that English law should govern the assessment of damages. Their Lordships arrived at that conclusion for three distinct reasons, respectively adopted by two, two and one of their number. The last expressly disagreed with both other sets of reasoning. *Chaplin v. Boyes* nonetheless became binding authority for the proposition stated.

26. I am also unable to accept the submission that the judgments of the minority should be ignored for all purposes. The question is whether there was majority agreement on the legal proposition in question, and that it was a necessary part of the reasoning of all those who adhered to the proposition. For that purpose there does not need to be agreement with the majority on every legal proposition or on the question whether individual appeals should or should not be allowed.

27. In *Adams*, the first appellant was convicted of murder. His case was later referred by the CCRC to the CACD who allowed his appeal on the ground that his legal representatives had failed to deploy evidence from the unused material. His conviction was unsafe. The second and third appellants had been tried separately for murder in Northern Ireland. The sole evidence in each case consisted of confessions which the appellants unsuccessfully had sought to exclude on the ground that they resulted from ill-treatment. Newly discovered facts threw doubt on the officers' credibility. Amongst the arguments advanced on behalf of all the appellants (and supported by the interveners) was that the presumption of innocence guaranteed by article 6(2) ECHR applied to proceedings for compensation following acquittal with the consequence that article 14(6) ICCPR and section 133 should be given a wide meaning. It was suggested that otherwise the presumption of innocence would be called into question. It was in those circumstances that the court came to determine whether article 6(2) had any bearing on the questions in issue.

28. Lord Hope analysed the Strasbourg case law before stating his conclusion on this issue in 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 41-43, 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."

Lord Phillips dealt with the issue in para 58. He agreed with Lord Hope and also with the reasoning of Hughes LJ in *R (Allen) v. Secretary of State for Justice* [2008] EWCA Civ 808; [2009] 1 Cr.App.R. 2 at para 35, to which I shall return. 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."

Lord Kerr agreed with Lord Hope on this topic: para 181. Lord Judge opened his observations in para 255 by saying:

> "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."

Those were the cases dealing with the presumption of innocence considered in factual contexts which post-dated the discontinuance of criminal proceedings, an acquittal or a successful appeal. Lord Judge noted that none of those decisions was concerned with A3P7 (the analogue of article 14(6) ICCPR).

29. Therefore, as the claimants recognise, seven members of the court decided that article 6(2) ECHR was an irrelevance for the purposes of deciding the scope of section 133 of the 1988 Act. Article 6(2) had no bearing on the statutory scheme. To my mind, it is clear that the conclusion was considered by those members of the court to be a necessary part of the reasoning in deciding the true scope of the meaning of "miscarriage of justice". Had any of their Lordships considered that it did bear on the interpretation of section 133, their resulting analysis would have been different. It is not possible with confidence (save in the case of Lord Phillips and Lord Clarke) to determine whether that analysis might have delivered a different interpretation. As I have noted Lord Phillips considered that "on no view" was section 133 concerned with an applicant proving his innocence and Lord Clarke stated that his view of the

scope of the term "miscarriage of justice" could not possibly offend against the presumption of innocence.

30. For these reasons I am satisfied that this court is bound by the decision in *Adams* to hold that article 6(2) has no bearing on a decision for compensation under section 133 of the 1988 Act. That decision binds us whether a "miscarriage of justice" encompasses only Category I cases (as section 133(1ZA) later provided) or the additional category. That conclusion leads inexorably to the further conclusion that there can be no declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 whatever the Strasbourg Court may have said since.

31. Before turning to *Allen* in Strasbourg there are two further short matters which merit discussion.

32. First, the submissions advanced on behalf of the claimants rest upon the proposition that the reasoning which led Lord Hope, Lord Phillips and Lord Kerr to conclude that article 6(2) was irrelevant were different from those of Lord Judge. I am unpersuaded by that submission. The legal maxim "*lex specialis derogat legi generali*", almost invariably shortened to *lex specialis,* is concerned with a law which governs a specific subject matter. It reflects a rule that a law which governs a specific matter overrides, or takes precedence over, a law of general application. The short explanation given by Lord Judge for his above quoted conclusion referred to the absence of any Strasbourg authority suggesting that article 6(2) applied to A3P7 and why he thought it could not. It is true that Lord Judge did not use the label "*lex specialis*" but the substance of what he said was to the same effect as Lord Hope.

33. Secondly, the question arises whether even were we not bound by the Supreme Court in *Adams* we would be bound by the Court of Appeal in *Allen* to the same effect. That was also decided before section 133(1ZA) was enacted in 2014. Lorraine Allen was convicted of the manslaughter of her infant son. Five years after conviction her appeal to the CACD was allowed on account of advances in medical thinking which opened the possibility that the injuries sustained by her son were accidental, even though the case against her remained strong. In *Adams* terms this would have been a Category III case. It was argued in *Allen* in the Court of Appeal Civil Division, in litigation following the Secretary of State's refusal to pay compensation under section 133 of the 1988 Act, that the appellant was entitled to compensation because to deny it would question her innocence and thus violate article 6(2). The contention (repeated later in *Adams*) was that section 133 should be given a wide interpretation to achieve compatibility with article 6(2). Having considered much of the Strasbourg jurisprudence, Hughes LJ (who gave the only reasoned judgment) set out nine reasons why that jurisprudence did not assist the appellant's argument: see para 35. Amongst those reasons was that article 6(2) had no application to claims under section 133. In my judgment, that too binds us.

Allen in Strasbourg

34. In *Allen* the Secretary of State had refused the claim under section 133 because he did not consider that a change in medical opinion was a new or newly discovered fact. In the High Court, Mitting J decided that the Secretary of State had taken too narrow a view of what could constitute a new fact, but that the circumstances did not demonstrate a miscarriage of justice for the purposes of section 133. In the Court of

Appeal, Hughes LJ noted that the conclusion of the CACD was that fresh medical evidence *might* have led to a different conclusion by the jury. There remained a case to go to the jury. There was no miscarriage of justice in the sense required by section 133.

35. In the proceedings before the Strasbourg Court, the applicant accepted that the failure to pay her compensation did not in itself raise any issue under the ECHR. She accepted that it did not imply anything about the state's view of her guilt or innocence. Her complaint was that the terms in which the High Court and the Court of Appeal refused her claim for judicial review were "based on reasons which gave rise to doubts about her innocence": para 80. The Grand Chamber produced a single judgment albeit with a separate concurring opinion from Judge De Gaetano. Its conclusion at para 105 was that article 6(2) is applicable to compensation decisions made under section 133 (and also would be applicable to A3P7) but that the observations in the domestic courts to the effect that there remained a strong case against Ms Allen did not demonstrate a lack of respect for the presumption of innocence (para 136).

36. It is critical to understanding the judgment of the Strasbourg Court that it was not concerned with the meaning of "miscarriage of justice" or with the compatibility of section 133 of the 1988 Act with article 6(2).

37. The Strasbourg Court noted that the facts in *Allen* did not call for a resolution by the CACD of the divergence of opinion in *Mullen* about what was encompassed within the term "miscarriage of justice" (because the applicant's case did not fall within any definition of "miscarriage of justice") but also noted Hughes LJ's preference for Lord Steyn's approach. It set out his view that if the need was to show that the new fact demonstrated innocence, whether that was so would be apparent from the terms of the judgment of the CACD, even if the judgment did not say so in terms. It also quoted in full the nine reasons given by Hughes LJ on the article 6(2) question: paras 40 and 41.

38. The Strasbourg Court noted that article 6(2) has two aspects. The first is concerned with criminal proceedings themselves. The second arises when criminal proceedings are over, that is to say following discontinuation or after acquittal. In para 98 there is a long list of cases relating to the second aspect, broken down into nine categories. One of those categories is "a former accused's request for compensation for detention on remand or other inconvenience caused by the criminal proceedings". These cases relate to national legislation that provides for compensation in limited circumstances following immediately upon acquittal. The concern was that an individual might be acquitted but then denied compensation by the court in terms which suggested that he was really guilty. None of the cases was concerned with applications for compensation in accordance with A3P7 following a miscarriage of justice exposed by new evidence. At para 99 the court noted that Austrian legislation and practice:

> "linked the two questions – the criminal responsibility and right to compensation – 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 of the former, resulting in the applicability of article 6(2) to the compensation proceedings."

It continued by explaining that in other cases the court had found that the compensation claim "not only followed the criminal proceedings in time, but was also linked to those proceedings in legislation and practice, with regard to both jurisdiction and subject matter". This resulted in linkage which imported the application of article 6(2). The court referred to the position when civil proceedings are launched by a victim against an acquitted defendant. Article 6(2) continues to apply, but has the necessary linkage only if a statement imputing criminal liability (rather than civil liability) is made: para 101.

39. The Strasbourg Court stated its conclusion on the issue of applicability of article 6(2) between paras 103 and 108. It formulated the principle as follows:

> "103. [T]he 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 the criminal proceedings in order to ensure that, as regards any charge which was nor proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the application of Article 6§2 in these cases.
>
> 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.
>
> 105. Having regard to the nature of the Article 6§2 guarantee outlined above, the fact that section 133 of the 1988 Act was concerned to comply with the State's obligations under Article 14(6) ICCPR, and that it is expressed in terms that are almost identical to Article 3 of Protocol No. 7, does not have the consequence of taking the impugned compensation proceedings outside the scope of the applicability of Article 6 § 2, as argued by the Government."

40. The Strasbourg Court went on to consider whether there was sufficient linkage in the applicant's case:

> "107 … In this respect, the Court observes that proceedings under section 133 of the 1988 Act require that there has been a reversal of a prior conviction. It is the subsequent reversal of the conviction which triggers the right to apply for compensation for a miscarriage of justice. Further, in order to examine whether the cumulative criteria in section 133 are met, the Secretary of State and the courts in judicial review proceedings are required to have regard to the judgment handed down by the CACD. It is only by examining the judgment that they can identify whether the reversal of the conviction, which resulted in an acquittal in the present applicant's case, was based on new evidence and whether it gave rise to a miscarriage of justice.
>
> 108. The Court is therefore satisfied that the applicant has demonstrated the existence of the necessary link between the criminal proceedings and the subsequent compensation proceedings under section 133 of the 1988 Act to ensure that the applicant was treated in the latter proceedings in a manner consistent with her innocence."

41. The applicant complained about the observations in the High Court that there was still "powerful evidence against her" and in the CACD that the new evidence "might" have resulted in her acquittal and that there was a case to go to the jury. In considering whether those observations offended against the presumption of innocence, the Strasbourg Court analysed its approach in previous cases in four distinct circumstances. First, criminal cases which were discontinued following which costs had been denied to the defendant. In such cases, reasoning suggesting the defendant was in fact guilty was objectionable in article 6(2) terms, but voicing suspicions was not: para 120 and 121. Secondly, it then referred to the decision in *Sekanina v. Austria* (1993) 17 EHRR 221 which drew a distinction between cases which had been discontinued and those where there had been a determination on the merits. It was not appropriate to rely upon suspicions following acquittal on the merits as is permissible following discontinuance. That distinction had been followed consistently since: para 122. Thirdly, it referred to civil proceedings against an acquitted defendant arsing on the same facts but judged on a lower standard of proof and noted:

> "If the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling with the ambit of Article 6 § 2 … " para 123

Fourthly, it referred to disciplinary proceedings which arise out of the same subject matter as criminal proceedings: para 124. The conclusions that followed were:

> "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.
>
> 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 the reasoning with Article 6 § 2 … Thus in a case where the domestic court held that it was "clearly probable" that the defendant 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 … 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 … 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."

42. In considering whether the applicant's right to be presumed innocent had been respected, the Strasbourg Court noted that the conviction had been quashed because it was unsafe without the CACD making an assessment of all the evidence and making a decision on the merits, as would the jury. For this reason, the circumstances of an acquittal following an appeal to the CACD were to be equated with the approach in discontinuance cases, rather than following a trial: para 127. In para 128 it compared the language of section 133 with A3P7, which are almost identical. There was nothing in the criteria themselves which calls into question the innocence of an acquitted person. It also recognised that "more than an acquittal" was required to amount to a "miscarriage of justice" and continued:

> "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 of the Supreme Court in *Adams*."

The ultimate conclusion was that there had been no violation:

> "Both the High Court and the Court of Appeal referred extensively to the judgment of the CACD to determine whether a miscarriage of justice had arisen and did not seek to reach any autonomous conclusions on the outcome of the case. 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." Para 135

43. Before reaching that conclusion the Strasbourg Court had revisited *Mullen* in terms which Miss Williams submits demonstrate that, were the compatibility of section

133(1ZA) to be before them, they would condemn it as incompatible with the presumption of innocence. The discussion is found in para 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 Note 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". It is wholly understandable that … national judges should refer to … the understanding of their drafters. However, the Explanatory Note … does not constitute an authoritative interpretation of the text … Its references to the need to demonstrate innocence must now be considered to have been overtaken by the Courts 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>" Emphasis added.

44. Before turning to consider the claimant's contention that the reasoning of the Strasbourg Court in *Allen* leads inevitably to the conclusion that section 133(1ZA) cannot stand with article 6(2), I should mention the separate opinion of Judge De Gaetano. He made the following points:

i) The judgment left unresolved what could and could not be said in domestic civil compensation proceedings.

ii) He had hoped for a reassessment of article 6(2) in dealing with post-acquittal proceedings. Here the majority had opted for a mere compilation of cases and generic statements.

iii) The formulation that compliance amounted to "it all depends on what you say and how you say it" is just playing with words and is "most unhelpful". Similarly formulations that refer to context.

iv) In civil proceedings brought by a victim, the standard of proof may be different but the reality and the perception of all but lawyers if the claim succeeds is that a court is saying the defendant was guilty.

v) He considered that Article 6§2 "has no place whatsoever" in compensation proceedings following acquittal.

Discussion

45. I readily accept that the sentence I have emphasised in the quotation from para 133 of the Strasbourg Court's judgment provides the foundation for an argument that it might conclude that the words of section 133(1ZA) offend against the presumption of innocence, following as it does the explicit reference to A3P7 and the Explanatory Note. I would venture to suggest, however, that such a conclusion would be wrong, even assuming that article 6(2) is applicable to decisions under section 133 of the 1988 Act.

46. On the question of whether article 6(2) has any application, the competing arguments are set out in the reasoning in the domestic case law, on the one hand, and *Allen* in Strasbourg, on the other. There appears to me to be substance in Judge De Gaetano's criticisms, including his view that article 6(2) has no place in compensation proceedings of this or any other sort following acquittal. That last observation echoes the views articulated in the reasoning of Lord Steyn in *Mullen* and Lords Hope, Phillips and Judge in *Adams*. I continue, with respect, to find that reasoning persuasive in the face of the contrary conclusion reached by the Strasbourg Court. It may be a little harsh, as Mr Strachan QC submits, to say that the conclusion in Strasbourg relating to the applicability of article 6(2) does not follow from what comes before; or as Judge De Gaetano hinted that it amounts to little more than a litany of cases followed by general observations. Perhaps the key is in an observation of Lord Phillips in *Adams* at para 58:

> "The court's expansion of what would seem to be a rule intended to be part of the guarantee of a fair trial into something coming close to a principle of the law of defamation is one of the more remarkable examples of the fact that the Convention is a living instrument."

That was said in the context of his conclusion that article 6(2) had no bearing on section 133 of the 1988 Act. The Strasbourg Court has long interpreted article 6(2) in a way which takes its meaning well beyond its natural language and the original intention underlying it. The further step taken in applying it to compensation proceedings of the sort in issue in this case may not be altogether surprising.

47. The contention, assuming the applicability of article 6(2), that section 133(1ZA) would be found incompatible with the presumption of innocence rests on a series of propositions:

i) that it amounts to a requirement that an applicant for compensation must prove his innocence; and

ii) that it is indistinguishable from Lord Steyn's test in *Mullen* which the Strasbourg Court disapproved; and

iii) that by implication the Strasbourg Court suggested and can be taken to have decided in *Allen* that his test was objectionable.

48. To understand whether section 133 of the 1988 Act, as amended, requires an applicant for compensation to prove his innocence it is convenient to reformulate the statutory

provision by incorporating the new definition of "miscarriage of justice" within its body:

> "… 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 the person did not commit the offence, 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 etc."

49. The language 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.

51. As to the second, there appears to be some possible confusion in the analysis in *Allen* of Lord Steyn's speech in *Mullen.* In its recital of the domestic authorities, the Strasbourg Court referred to various parts of his speech and his conclusion at para 56:

> "I conclude that the autonomous meaning of the words "a miscarriage of justice" extends only to "clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly

> innocent" as it is put in the explanatory report [of A3P7]. This is the international meaning which Parliament adopted when it enacted section 133 of the 1988 Act."

In para 62 of its judgment, the Strasbourg Court said, "as Mr Mullen was not innocent of the charge, he was not entitled to compensation under section 133". That is a fair reflection of what Lord Steyn himself said in his para 57. But it should not be understood as being divorced from the statutory language requiring an appeal against conviction to have been allowed on the basis of a new fact, and that new fact establishing a miscarriage of justice. Lord Steyn summarised the submission on behalf of the Secretary of State at para 34 of his speech as being:

> "that the concept of a "miscarriage of justice" extends only to cases where a person who was convicted of an offence is later shown beyond reasonable doubt, by virtue of some new or newly discovered fact, to have been innocent of the offence of which he was convicted."

52. The debate in *Mullen* flowed from the unusual circumstances in which the appeal was allowed by the CACD. He had served 10 years of a 30 year prison sentence for conspiracy to cause explosions. He had been deported from Zimbabwe to the United Kingdom and arrested on arrival. His deportation had been secured by the British authorities contrary to the law of Zimbabwe and international law. That fact was not disclosed at the time of his trial. It came to light years later. The questions for the House of Lords were (a) the meaning of "miscarriage of justice" and (b) whether a conviction for an abuse of process preceding an otherwise fair trial could amount to a "miscarriage of justice" for the purpose of section 133: para 33. The appeal was allowed on the basis that section 133 was not concerned with abuse of process cases; alternatively, even if it were, the discovery of the new fact (viz. unlawful removal from Zimbabwe) did not prove that Mr Mullen was innocent. On the contrary, he did not suggest that he was in fact innocent.

53. Miss Williams reasonably submits that the Strasbourg Court was well aware of the need for the new fact to show beyond reasonable doubt that a miscarriage of justice had occurred. Indeed they refer to it in para 128 and elsewhere. It follows, she submits, that it was well understood that Lord Steyn was not proposing a freestanding test that the applicant for compensation must prove his innocence. However, both para 62 and the passage in para 133 on which she relies do at least raise a question mark regarding the position.

54. As to the third proposition, it should not be overlooked that the Strasbourg Court received no submissions on the question whether Lord Steyn's test (whatever it may have been) would offend against the presumption of innocence if it reflected the statutory test. It was not an issue before the court.

55. In summary therefore:

i) The Strasbourg Court decided in *Allen* that article 6(2) is applicable to compensation decisions made under section 133 of the 1988 Act, contrary to the conclusion of the Supreme Court in *Adams*.

ii) Whether or not that conclusion survives any re-examination of the sort favoured by Judge De Gaetano, the decision in *Allen* does not lead to the conclusion that the Strasbourg Court would necessarily consider section 133, as amended by the 2014 Act, to violate without more the presumption of innocence. On the contrary, in my judgment, there is no incompatibility.

iii) The claimants have not suggested that the language of the letters denying them compensation otherwise offends the reasoning in *Allen* relating to the language used.

56. The disagreement between the Supreme Court and the Strasbourg Court concerning the applicability of article 6(2) does not determine the question whether section 133 of the 1988 Act as amended by the 2014 Act is incompatible with the ECHR. Miss Williams submits that if this court considers itself bound by *Adams* to conclude that article 6(2) has no application to decisions made under section 133, we should give permission for a leap-frog appeal to the Supreme Court as contemplated by Lord Bingham in *Kay*. That does not appear to me to be either necessary or appropriate given that the disagreement between the two courts is not determinative of the main issue in these claims.

Mr Nealon's Public Law Challenge

57. Mr Stanbury advances a modified *Wednesbury* challenge on behalf of Mr Nealon. He submits that the Secretary of State had regard to irrelevant considerations, in particular by placing weight on the conclusions of Dr Clayton. He also submits that the Secretary of State failed properly to evaluate the totality of the material before him (the CACD judgment, the underlying evidence and the CCRC reference) and appears to have applied a standard of proof which required scientific certainty, rather than beyond reasonable doubt as understood in criminal courts. He disavows an "irrationality" argument and recognises that the material does not dictate only one outcome. He submits that if this argument succeeds the remedy should be a quashing order with a direction to the Secretary of State to reconsider the matter, rather than a mandatory order requiring him to pay compensation.

58. The question of what is a relevant consideration for the purposes of a decision under section 133 of the 1988 Act is not identified in the statute. There is no statutory lexicon of relevant or irrelevant factors. In those circumstances it is for the decision maker to determine what is relevant or irrelevant, a process which itself may be subject to challenge on *Wednesbury* grounds: see *CREEDNZ Inc v. Governor General* [1981] NZLR 172.

59. The reference in the decision letter to the plausibility of the attacker transferring little or no DNA to the victim's clothing comes from Dr Clayton's evidence (and also from the judgment of the CACD). I cannot accept that the Secretary of State was disabled from taking that (and any other expert evidence) into account when making his evaluation of whether the new fact proved that Mr Nealon did not commit the offence. Mr Stanbury took us in detail to the various experts' reports with a view to making good his submission that there was strong evidence that the unknown male was the attacker and that Dr Clayton's evidence lacked substance.

60. The reality in this case is that of the Secretary of State's decision is based squarely upon the judgment of the CACD. I have set out the main conclusions found in Fulford LJ's judgment. I do not accept that the Secretary of State was obliged, as a matter of law, to undertake his own detailed analysis of the evidence or evaluate for himself the chances that the unknown male was not the attacker. There is nothing in the decision letter which suggests that the Secretary of State misunderstood the standard of proof engaged in the decision. In the face of the way in which the CACD expressed itself the Secretary of State's decision that the section 133 criteria were not met in Mr Nealon's case is not legally objectionable.

Conclusion

61. If my Lady agrees, I would grant permission to apply for judicial review to both claimants but dismiss the claims.

Mrs Justice Thirlwall

62. I agree.