Putting the wheels back on: a better approach to compensation for miscarriages of justice

Introduction

In December 2014, Victor Nealon was released from prison after 17 years, when his conviction for rape was overturned on the strength of a DNA test which pointed to another man being the attacker.[1] He appeared via videolink from HMP Wakefield. After the hearing he was released and taken to Leeds Railway Station. He was given £46 to buy a train ticket to Shrewsbury, where he was supposed to meet a friend. His friend, however, had gone to meet him at the Royal Courts of Justice in London. Nobody had told him about the videolink. Before his imprisonment Mr Nealon had been employed as a postman. 17 years later, as a result of an unsafe conviction, he was left on the street.[2]

His application for compensation for a miscarriage of justice was refused by the Secretary of State for Justice on the basis that he had not established beyond reasonable doubt that there had been a 'miscarriage of justice' as defined by s.133(1ZA) Criminal Justice Act 1988, as amended:

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

This was upheld by both the High Court and the Court of Appeal.[3] Mr Nealon's fundamental difficulty was that the Court of Appeal had found that his conviction was unsafe, as the new evidence might reasonably have led the jury to reach a different verdict.[4] The Court did not consider whether or not he committed the offence, nor should it have under s.2 Criminal Appeal Act 1968 and in view of

[1] *R v Nealon* [2014] EWCA Crim 574. The opinions here expressed are personal.
[2] Jon Robins, 'Washing Hands of Justice?'180 JPN 282 (2016); Mark Newby, 'Our lack of care for the victims of miscarriages of justice is a national scandal,' *Justice Gap*, http://thejusticegap.com/2016/06/lack-compensation-victims-miscarriages-justice-nothing-short-scandal/ [5 September 2016] (2016).
[3] *R(Hallam and Nealon) v Secretary of State for Justice* [2016] 3 WLR 329.
[4] *R v Nealon* at [35].

the presumption of innocence. Sir Thomas Bingham MR (as he then was) highlighted the distinction and its effect in another case:[5]

> 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. […] 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.

The distinction is somewhat legalistic and for many difficult to understand.[6] It nonetheless has significant practical consequences that go beyond a mere entitlement to compensation. Persons who have been released after serving a custodial sentence are provided with support from the Probation Service in settling into life outside prison. Mr Nealon and others like him have no such recourse, other than advice from the Miscarriage of Justice Support Service.[7]

It has been demonstrated that the need for support is significant. The difficulties of adjustment after release on appeal are 'severe, bewildering and unexpected.'[8] A 2013 study of 54 persons in this position found that psychiatric morbidity during imprisonment and after release was common. Conditions include post-traumatic stress disorder; substance abuse; and severe depression. Of the 32 persons who had been employed before imprisonment, only eight were employed when assessed after release. In addition to going some way to acknowledging the wrong suffered by those wrongly imprisoned, compensation can facilitate the specialist services that they require as a result of their period in custody.

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[5] *R(Bateman) v Secretary of State for the Home Department* [1994] 7 Admin LR 175.
[6] Siôn Jenkins, 'Miscarriages of justice and the discourse of innocence,' 40(3) Journal of Law and Society, 329-55 (2013).
[7] Ruth Runciman, 'Anti-Social Behaviour Bill briefing,' *Justice Gap*, http://thejusticegap.com/2013/11/anti-social-behaviour-bill-briefing/ [5 September 2016] (2013).
[8] *Ibid.*

This paper will summarise the state of the law around compensation for miscarriages of justice. It will be argued that the rationale behind the law is not coherent or satisfactory, and that the law may be contrary to the presumption of innocence in common law and under Article 6(2) European Convention on Human Rights 1950. A reform will then be suggested that is desirable, practical and useful.

The current law

International law

The United Kingdom is obliged under international law to compensate victims of miscarriages of justice. Article 14(6) International Covenant on Civil and Political Rights 1966 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.

The United Kingdom signed the Covenant on 16 September 1968 and ratified it on 20 May 1976.[9]

The ex gratia *scheme*

For some years, the United Kingdom gave effect to this obligation by way of an *ex gratia* scheme; this later operated alongside the statutory scheme established by the 1988 Act. The *ex gratia* scheme

[9] Sally Lipscombe and Jacqueline Beard, 'Miscarriages of justice: compensation schemes,' House of Commons Library, SN/HA/2131 (2015).

operated in accordance with a statement made in 1985 by the then Home Secretary, Douglas Hurd. Compensation would normally be paid on application by anyone who had spent time in custody and:[10]

- had received a free pardon or had his conviction quashed on a reference or appeal out of time;
- his period in custody followed a wrongful conviction or charge resulting from serious default by the police or another public authority; or
- in exceptional circumstances, but not merely on an acquittal, where facts emerged at trial or on appeal within time that exonerated him.

It can be seen that the right to compensation was limited: those who were acquitted after remand in custody, and those who whose convictions were quashed on an appeal in time, were not normally entitled to claim.

This scheme was abolished in 2006. The then Home Secretary Charles Clarke indicated that the existence of an *ex gratia* scheme was unnecessary and confusing, given the statutory scheme. Abolition was in line with a rebalancing of the justice system to take better account of the needs of victims.[11] It has been argued that victims of miscarriages of justice are also (in)direct victims of crime.[12] In any case, an application for judicial review of the decision was not successful.[13]

The statutory scheme

All that remains therefore is the statutory scheme under s.133 of the 1988 Act, which is based largely on the wording of the 1966 Covenant.

[10] HC Deb., 29 November 1985, vol.87, cols 689-690.
[11] HC Deb., 19 April 2006, cols 14-17WS.
[12] e.g. John Spencer, 'Compensation for wrongful imprisonment,' Crim. LR 11, 803-822 (2010).
[13] *R(Niazi) v Secretary of State for the Home Department* (2008) 152(29) SJLB 29.

S.133(5) of the Act limits the circumstances in which a conviction can be said to have been reversed, such that a successful appeal within the usual 28-day time limit is not included. The 'exceptional circumstances' provision for compensation in the *ex gratia* scheme is not preserved in England and Wales. Case law has established that the new or newly discovered fact must be fresh evidence, not a technical or procedural error; it must also be the sole or principal reasons that the conviction was quashed.[14]

Mullen

Until 2014, there was no statutory definition of 'miscarriage of justice' for the purpose of s.133 of the 1988 Act. In *R(Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 there was disagreement over the meaning of the term. Lord Bingham stated that the term was concerned with wrongful convictions, which extended not only to those who were innocent of the offences convicted, but also to those who, because something had gone seriously wrong with the investigation or trial, should not have been convicted, whether or not they were guilty. Lord Steyn held however that the term extended only to those cases where the person concerned was clearly innocent. After *Mullen*, both tests seem to have been followed.[15]

Adams

R(Adams) v Secretary of State for Justice [2012] 1 AC 48 was an attempt to clarify the law.[16] The Justices conducted a lengthy review of the *travaux préparatoires* to Article 14(6) of the 1966 Covenant, but found them of limited assistance, beyond indicating that it was not intended to limit compensation to those who were clearly innocent.

[14] *R(Bateman)*; *R(Murphy) v Secretary of State for the Home Department* [2005] 1 WLR 3516; Stephanie Harris, 'Miscarriage of Justice,' Westlaw Insights (2015).
[15] *R(Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin); *R(Harris) v Secretary of State for the Home Department* [2009] 2 All ER 1.
[16] Marny Requa and Hannah Quirk, *The Supreme Court on compensation for miscarriages of justice*, 75(3) MLR, 387-400 (2012).

Lord Phillips PSC found that at [37] that s.133 of the 1988 Act had two purposes. The primary purpose was to provide compensation to those convicted and punished for crimes that they did not commit. The subsidiary purpose was to ensure that compensation would not be paid to those convicted and punished for crimes they did commit. The problem, as adverted to above, is that the criminal appeal process deals with the safety of a conviction, not guilt or innocence. It is therefore [37]:

> […] not satisfactory to make the mere quashing of a conviction the trigger for the payment of compensation. It was this problem which led to the adoption of the imprecise language of article 14.6, which has been reproduced in section 133. In interpreting section 133 it is right to have in mind the two conflicting objectives. It is necessary to consider whether the wording of the section permits a balance to be struck between these two objectives and, if so, how and where that balance should be struck.

The Court adopted four categories of successful appeal identified by Dyson LJ (as he then was) in Adams' appeal as the framework for their discussion. Category 1, where fresh evidence clearly showed that the defendant was innocent, was agreed to fall within s.133. Category 2, where the fresh evidence was such that had it been available at the time of the trial, no reasonable jury could possibly have convicted, was considered by a majority of 5 to fall within s.133. However, it was considered that more robust wording was required: 'a new fact would show that a miscarriage of justice has occurred when it so undermined the evidence against the defendant that no conviction could possibly be based on it.' As innocence is not a concept known to the criminal justice system, Lady Hale JSC considered at [116] that this approach was consistent with the 'golden thread' that a person is only guilty if the state can prove it beyond reasonable doubt.

Category 4, where the fresh evidence rendered the conviction unsafe because had it been available at the time of the trial, a reasonable jury may or may not have convicted, was agreed to be outside s.133,

as inclusion would give no sensible meaning to the phrase 'beyond reasonable doubt.' Category 4, where something has gone seriously wrong during the investigation or trial, was also agreed to be outside s.133, as it deals with abuse of process rather than guilt or innocence.

It was clearly necessary for the Court to draw the line somewhere in determining who would be entitled to claim compensation. There was no perfect solution. As Lord Phillips PSC observed at [50], limiting the right to Category 1 cases would mean that all those who could claim would be innocent, but some innocent persons would be unable to claim if they could not demonstrate their innocence. On the other hand, at [55], including Category 2 would have the effect that not all those entitled are in fact innocent. It would however ensure those innocent persons who cannot prove their innocence beyond reasonable doubt can claim. This was considered the more satisfactory outcome.

Ali

A number of test cases following *Adams* came before the High Court in *R(Ali and others) v Secretary of State for Justice* [2013] 1 WLR 3536. The Court acknowledged that there was a lack of clarity in relation to the territory between Categories 1 and 3, and proposed a reformulation or Lord Phillips PSC's test which carried the same meaning but greater clarity.

Allen

Article 6(2) of the European Convention on Human Rights 1950 provides that every person is entitled to be presumed innocent until proven guilty. *Adams* found at [58] that the right was not engaged by s.133 of the 1988 Act, as the focus will be on the new or newly discovered fact. However in *Allen v United Kingdom* (2016) 63 EHRR 10, the European Court held at [104] that the right was engaged, as compensation claims would require an assessment of the criminal proceedings and invite comment on

the applicant's possible guilt. It was considered at [126] that in all cases the language used by the decision-maker would be critical to establishing whether the decision is compatible with Article 6(2).

The statutory definition

The Anti-social Behaviour, Crime and Policing Act 2014 introduced a statutory definition of 'miscarriage of justice' under s.133(1ZA) of the 1988 Act. This has the effect of further limiting entitlement to those who can establish that the new or newly discovered fact shows that they did not commit the offence.

The then government justified this on the basis that the law was unclear, resulting in a number of judicial review claims by unsuccessful applications for compensation, resulting in legal costs of £100,000 per year. It was necessary to introduce a statutory definition to clarify the law and stem the 'bulge' of claims following *Adams*.[17]

The Bill in its original form required that the applicant show beyond reasonable doubt that he is innocent of the offence. Following a Lords proposed amendment that aimed to give statutory effect to the test proposed by Lord Phillips PSC in *Adams*, the then government proposed the current form. In the House of Commons, Damian Green for the government struggled to establish that there was a difference between 'did not commit' and 'is innocent of;' in the House of Lords, Lord Faulks frankly admitted that the only difference was semantic.[18]

[17] Ministry of Justice, *Anti-Social Behaviour, Policing and Crime Bill: Fact Sheet: Compensation for miscarriages of justice (clause 151),* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251337/18_Factsheet_miscarriages_of_justice_-_updated_for_Lords.pdf [5 September 2016] (2013); *Idem*, *Clarifying the circumstances in which compensation is payable for miscarriages of justice (England and Wales)* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197579/DOC002.PDF [5 September 2016] (2013).

[18] HC Deb., 4 February 2014, vol.575, col 163.; HL Deb., 11 March 2014, vol. 752, col 1710.

Proposal for reform

Redefinition of 'miscarriage of justice'

The example of Mr Nealon should demonstrate that the test, already narrow before 2014, is now almost impossible to satisfy. The reform proposed here is straightforward: to adopt the test suggested by Lord Phillips PSC in *Adams*.[19] Thus S.133(1ZA) of the 1988 Act would read:

> […] 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 conclusively that the evidence against the person at trial is so undermined that no conviction could possibly be based on it […].

This meets the asserted aim of reducing the (relatively modest) legal cost of judicial review, as any statutory definition would. Further and more significantly, it ensures that those who are innocent but who cannot prove that they did not commit the offence are not excluded. Examples include those who are convicted solely on the basis of a discredited witness or improperly obtained confession, or (as in Mr Nealon's case) on the basis of undermined scientific evidence. On the other hand, it is a higher bar than the safety test applied by the Court of Appeal, and accordingly excludes those who may have committed the offence. This test would not be difficult to operate: as noted in *Adams*, the process is similar to that of 'no case to answer.' Finally, there is no risk to the presumption of innocence, as the focus is squarely on the quality of the evidence, rather than responsibility or guilt.

[19] Justice, *Anti-social Behaviour, Crime and Policing Bill: House of Lords Report Stage: Briefing and suggested amendments on compensation for miscarriages of justice*, https://www.liberty-human-rights.org.uk/sites/default/files/JUSTICE%20and%20Liberty%20briefing%20for%20ASBCP%20Bill%20on%20compensation%20%28Jan%202014%29.pdf [5 September 2016] (2014).

Conclusion

After *Mullen*, Professor Spencer considered that the law was as bad as it could possibly be.[20] Notwithstanding that, the 2014 Act made it worse. It has excluded all *Adams* Category 2 claimants in the name of a relatively modest saving in legal costs.[21] The dilemma here is similar to that addressed by Blackstone's formulation, but it has been solved in the contrary manner, by setting a test that is very difficult to satisfy.

The proposed reform is desirable, in that it will reduce the terrible impact of miscarriages and the cost to the public purse of supporting victims by way of the NHS and social benefit payments. It is practical in that it is relatively inexpensive. It is useful, in that it increases the coherency and legitimacy of the criminal justice system.

(2,982 words)

[20] *Supra*, n.12.
[21] It is to be noted that the then government did not premise the amendment on any saving to compensation costs.