Miscarriages of justice: compensation schemes

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It is sometimes assumed that victims of miscarriages of justice must be entitled to compensation, particularly if they have spent time in custody before being pardoned or having their convictions quashed. However, this is not the case: compensation is the exception rather than the rule.

Until April 2006, the Government operated two compensation schemes for victims of miscarriages of justice in England and Wales: a discretionary scheme and a statutory scheme. However, the discretionary scheme has since been abolished. The statutory scheme gives the Justice Secretary discretion to pay compensation to a wrongly convicted person "when 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".

In 2011, the Supreme Court ruled that the meaning of "miscarriage of justice" for the purposes of the statutory scheme should not be restricted to applicants who are able to conclusively demonstrate their innocence. Instead, it should be extended to cases where a new or newly discovered fact "so undermines the evidence against the defendant that no conviction could possibly be based upon it". However, the Government has since legislated to reverse the effect of this decision; for applications made on or after 13 March 2014, there will have been a miscarriage of justice "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence".

If the Secretary of State decides that an applicant is eligible for compensation under section 133, the question of how much should be awarded is determined by an independent assessor. She can make deductions for any conduct of the applicant that contributed to the conviction, for his criminal record and for "saved living expenses". The maximum amount of compensation payable is £1 million in cases where the applicant has been imprisoned for at least 10 years, or £500,000 in all other cases.

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1 International law

Article 14(6) of the *International Covenant on Civil and Political Right 1966* states:

> 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 UK signed the Covenant on 16 September 1968 and ratified it on 20 May 1976.

2 The discretionary compensation scheme

Until April 2006, the Home Secretary operated a discretionary compensation scheme for those who had been detained in custody as the result of a wrongful conviction. The scheme was operated in accordance with a statement made in 1985 by the then Home Secretary Douglas Hurd, in which he set out the criteria he adopted when considering whether to make such payments. He said that compensation would "normally" be paid on application to anyone who had spent a period in custody **and** who met one of the following additional criteria:

- he had received a free pardon or had his conviction quashed by the Court of Appeal or the House of Lords following a reference under s17 of the *Criminal Appeal Act 1968* or an appeal out of time; or

- his period in custody followed a wrongful conviction or charge that resulted from serious default on the part of the police or some other public authority; or

- his case involved exceptional circumstances, for example where facts emerged at trial or on appeal within time that completed exonerated him.[1]

In relation to the last of these criteria, he stressed that he would not pay compensation "simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought" (i.e. simply because the defendant was found not guilty).

However, on 19 April 2006, the then Home Secretary Charles Clarke made a written ministerial statement announcing the immediate abolition of the discretionary scheme.[2] He said that its continued existence was "confusing and anomalous" given the introduction of a statutory compensation scheme in 1988 (see section 3 of this note). He added that the scheme was costing over £2 million a year to operate but was benefiting only between five and ten applicants.

The abolition of the discretionary scheme without notice or consultation was challenged in a judicial review application by three individuals who had been in the process of preparing compensation applications when the abolition was announced, and by a number of law firms that specialised in acting for such people. However, the Divisional Court held that the Home Secretary had not acted unfairly or in breach of legitimate expectation in abolishing the scheme without notice or prior consultation.[3] This decision was upheld by the Court of Appeal in July 2008.[4]

The only way in which the victim of a miscarriage of justice can therefore now apply to the Government for compensation is via the statutory compensation scheme.

3 The statutory compensation scheme

3.1 The *Criminal Justice Act 1988*

Section 133 of the *Criminal Justice Act 1988*, which came into force on 12 October 1988, sets out a statutory compensation scheme for miscarriages of justice.

Subsection (1) provides that:

> ...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 wording of this subsection is based largely on the wording of Article 14(6) of the *International Covenant on Civil and Political Rights 1966*.

The circumstances in which a conviction is "reversed" are defined in subsection (5). These cover cases where a conviction is quashed:

- on an appeal out of time;

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1 HC Deb 29 November 1985 cc689-90W
2 HC Deb 19 April 2006 cc14-17WS
3 *R v Home Secretary ex p Niazi* [2007] EWHC 1495 (Admin)
4 *R v Home Secretary ex p Niazi* [2008] EWCA Civ 755

- on a reference under the *Criminal Appeal Act 1995*;
- on an appeal under section 7 of the *Terrorism Act 2000*; or
- on an appeal under Schedule 3 to the *Terrorism Prevention and Investigation Measures Act 2011*.

This definition means that a conviction will not have been "reversed" where it is overturned following an appeal **within** the usual time limit for appealing.[5] This makes the statutory scheme narrower in scope than the old discretionary scheme, as in exceptional circumstances the latter was capable of covering cases where the applicant's conviction was quashed on an appeal brought within time.

Applications for compensation must be made within two years of the date on which the applicant's conviction was reversed or on which he was pardoned, although the Secretary of State does have discretion to extend this deadline if he considers that there are exceptional circumstances to justify doing so.

The question of whether there is a right to compensation is determined by the Secretary of State. Any determination he makes will be open to challenge by way of judicial review.

3.2 The meaning of "miscarriage of justice"

As set out above, in order to be eligible for compensation under the statutory scheme, the applicant must have been pardoned or had his conviction quashed on the grounds that "a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice". The statutory scheme did not originally contain any definition of "miscarriage of justice"; however, this changed in March 2014 when the Government legislated to reverse the effect of a Supreme Court judgment.

Supreme Court - Adams

In May 2011, the Supreme Court considered the precise meaning of "miscarriage of justice" for the purposes of section 133. The case involved three appellants who had each claimed compensation under the statutory scheme after their convictions for murder had been quashed by the Court of Appeal. Their claims had been refused by the Secretary of State on the grounds that no miscarriage of justice under section 133 had occurred. Brief background to the appellants' cases is set out in the Supreme Court's press summary of the decision:

> Mr Adams was convicted on 18 May 1993 of the murder of Jack Royal. His conviction was referred to the Court of Appeal in 2007 on the ground that incompetent defence representation had deprived him of a fair trial. His representatives had failed to consider unused material provided by the police which would have assisted in undermining the evidence given by the sole prosecution witness. The Court of Appeal found that if this had been done the jury might not have been satisfied of Mr Adams' guilt, although he would not inevitably have been acquitted.
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> Mr McCartney was convicted of the murders of Geoffrey Agate and DC Liam McNulty, and Mr MacDermott that of DC McNulty, on 12 January 1979. The sole evidence was their admissions during interviews with the police. They alleged that these had been made after ill-treatment and called other witnesses who claimed to have suffered

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[5] The usual time limit for appealing a conviction from the Crown Court to the Court of Appeal is 28 days, although this can be extended at the court's discretion (for example where new evidence emerges months or years after the original trial). Appeals lodged within this time limit are referred to as "in time" appeals, appeals lodged at a later date are referred to as "out of time" appeals.

> similar treatment from the same group of police officers. The judge rejected their evidence. He had been told that a prosecution brought against one of these witnesses had not been proceeded with. But he was not told that this was because senior officers in the Department of the Director of Public Prosecutions considered that he had been assaulted by police officers to obtain his confession and that a conviction in another case, based on a confession obtained in similar circumstances and involving one of the same officers, had been quashed. The Court of Appeal in Northern Ireland quashed the convictions of Mr McCartney and Mr MacDermott on 15 February 2007 on the ground that this new evidence left it with 'a distinct feeling of unease' about the safety of their convictions.[6]

Lord Phillips listed four categories of circumstance in which a conviction may be quashed on the basis of the discovery of fresh evidence:

- **category 1**: where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted;
- **category 2**: where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant;
- **category 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
- **category 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.[7]

Section 133 has two conflicting objectives: the primary objective of providing compensation to those convicted and punished for crimes they did not commit; and the subsidiary objective of not providing compensation to those who have been convicted and punished for a crime they did commit. Lord Phillips considered that the question for the Supreme Court was whether section 133 could be interpreted in a way that balanced those two objectives and, if so, how and where that balance should be struck.[8]

Category 4 cases did not involve a miscarriage of justice for the purposes of section 133, as this category focused on abuses of process rather than the guilt or innocence of the convicted person.

Category 3 cases were also outside the scope of section 133, as this type of case does not demonstrate "beyond reasonable doubt" that a miscarriage of justice has occurred. Lord Phillips considered that including category 3 cases within the scope of section 133 would not strike a fair balance between the two competing objectives of the statutory scheme, as it would "include a significant number who in fact committed the offences of which they were convicted".[9]

The Court unanimously agreed that category 1 cases clearly involved a miscarriage of justice for section 133 purposes. However, there was disagreement as to whether section 133

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6 Supreme Court press summary, *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, 11 May 2011
7 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, para 9
8 Ibid, para 37
9 Ibid, para 41

should extend beyond this to category 2. By a majority of five to four, the Supreme Court held that it should.

Lord Phillips said that limiting the scope of section 133 to category 1 cases would:

> ... deprive some defendants who are in fact innocent and who succeed in having their convictions quashed on the grounds of fresh evidence from obtaining compensation. It will exclude from entitlement to compensation those who no longer seem likely to be guilty, but whose innocence is not established beyond reasonable doubt. This is a heavy price to pay for ensuring that no guilty person is ever the recipient of compensation.[10]

Lord Phillips, supported by Lord Hope, Lady Hale, Lord Kerr and Lord Clarke, instead held that the test for a section 133 miscarriage of justice should be based on a more robust version of category 2 cases (which would also incorporate category 1 cases):

> A new or newly discovered fact will show conclusively that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.[11]

Lord Phillips acknowledged that this test would not guarantee that all those who are entitled to compensation are in fact innocent. However, it would ensure that when innocent defendants are convicted on evidence that is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt.

Lord Judge, Lord Brown, Lord Rodger and Lord Walker dissented from the majority opinion. Lord Judge considered that "the ultimate and sure miscarriage of justice is the conviction and incarceration of the truly innocent", and that "no alternative or half-way house or compromise solution" was consistent with section 133. Lord Brown considered that there was no logical or principled dividing line between category 2 and 3 cases. His view was that excluding "a few who are in fact innocent" from the scope of section 133 was preferable to compensating "a considerable number ... who are guilty".[12]

On the facts of the appellants' cases, all of the justices agreed that Adams' case fell within category 3; his case was therefore outside the scope of section 133 and his appeal was dismissed. The majority held that McCartney and MacDermott's cases fell within the new test for a miscarriage of justice under section 133; they were therefore entitled to compensation and their appeals were allowed.[13]

High Court – Ali and Others

The Supreme Court's redefinition of what constituted a miscarriage of justice for section 133 purposes was considered by the High Court in October 2012, when it heard five cases involving individuals seeking compensation for miscarriages of justice. The cases were treated as lead cases, presenting the court with a range of factual scenarios to enable it to provide some guidance as to the application of the decision of the Supreme Court.[14]

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[10] Ibid, para 50

[11] Ibid, para 55

[12] Ibid, para 281

[13] The dissenting minority indicated that they would have remitted McCartney and MacDermott's cases back to the Secretary of State for further consideration in light of the judgment, rather than allowing or dismissing their appeals.

[14] *R (Ali and others) v Secretary of State for Justice* [2013] EWHC 72 (Admin)

The High Court noted the lack of clarity regarding "the territory between category 1 and category 3", which the majority of the Supreme Court in *Adams* had held fell within the statutory concept of miscarriage of justice.[15] The Court acknowledged the varying formulations of the test for category 2 cases but concluded that the differences did not reflect a difference in substance.[16]

For category 2 cases, Lord Justice Beatson and Mr Justice Irwin suggested a formulation of the test set out by Lord Phillips in *Adams* that they believed carried an identical meaning, but would be more useful to lawyers advising claimants and the Secretary of State:

> Has the claimant established, beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered?[17]

The Court dismissed the applications by Ismail Ali, Barry George, Kevin Dennis and Justin Tunbridge to quash decisions by the Justice Secretary to refuse them compensation. The Court quashed the Justice Secretary's decision to refuse compensation to Ian Lawless and ordered him to reconsider his decision.[18]

A new statutory definition

Section 175 of the *Anti-social Behaviour, Crime and Policing Act 2014*, which came into force on 13 March 2014, has reversed the effect of the judgments in *Adams* and *Ali*. It inserted a new subsection 1ZA into section 133 of the 1988 Act. Section 133(1ZA) now provides that there will have been a miscarriage of justice "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence".

The new definition applies to the determination of any application for compensation made on or after 13 March 2014, and to applications made before that date but which had not finally been determined by the Secretary of State by that date.

The Ministry of Justice's impact assessment for the change stated that it was being made to ensure that eligibility to the compensation scheme was limited to applicants who could show that they were clearly innocent. It stated that the intended effect was to lessen the burden on taxpayers and reduce unnecessary and expensive legal challenges to Government decisions to refuse compensation:

> By confirming a relatively narrow definition, the provision seeks to generate a more predictable and consistent approach to identifying cases where a miscarriage of justice has taken place. A clear definition enshrined in statute would make it easier for meritorious claimants to claims, and would make decisions on eligibility more transparent, and less likely to be the subject of legal challenge.[19]

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[15] Ibid, para 27
[16] Ibid, para 38
[17] Ibid, para 41
[18] Ibid, para 215
[19] Ministry of Justice, *Impact Assessment , Clarifying the circumstance sunder which compensation is payable for Miscarriages of Justice (England and Wales)*, 9 May 2013, p2

3.3 Assessing the amount payable

If the Secretary of State decides that an applicant is eligible under section 133, the question of how much compensation should be awarded is determined by an independent assessor. The current assessor is Dame Janet Smith DBE, a former Lady Justice of Appeal.[20]

The total amount of compensation payable must not exceed £1 million in cases where the applicant has been detained in a prison or hospital for at least 10 years when the conviction was reversed or the pardon granted,[21] or £500,000 in all other cases.

Compensation for loss of earnings in respect of any one year is capped at an amount equal to 1.5 times the median annual gross earnings according to the latest figures published by the Office of National Statistics at the time of the assessment.

Section 133A of the 1988 Act sets out the steps the assessor must follow when assessing compensation. In assessing the amount of compensation attributable to the applicant's suffering, she must have regard in particular to:

- the seriousness of the offence concerned and the severity of the punishment suffered as a result of the conviction; and
- the conduct of the investigation and prosecution of the offence.

She has the discretion to make deductions from the amount of compensation that she would otherwise have awarded by reason of either or both of the following matters:

- any conduct of the applicant appearing to the assessor to have directly or indirectly caused or contributed to the conviction concerned; and
- any other convictions of the applicant and any punishment suffered as a result of them.

In exceptional cases these deductions may be so great that only a nominal amount of compensation will be payable.

In 2007, the House of Lords made a controversial ruling (by a majority of four to one) that the assessor has the discretion to make a deduction from the lost earnings element of any compensation to account for "saved living expenses": i.e. outgoings that the accused would have incurred had he not been in prison, such as food and accommodation expenses. Lord Bingham said:

> If the appellants were awarded the full sum of their notional lost earnings with no deduction save tax, they would in reality be better off than if they had earned the money as free men since as free men they would have had to spend the minimum necessary to keep themselves alive. The deduction puts the appellants in the position in which they would in reality have been had they earned the money as free men and so compensates them for their actual loss.[22]

Lord Rodger, dissenting, argued:

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20 HC Deb 29 June 2011 cc51-2WS and Ministry of Justice press releases, *New independent assessor of compensation appointed*, 29 June 2011 and *Reappointment of Independent Assessor of Compensation for Miscarriages of Justice*, 11 June 2013

21 Section 133B of the 1988 Act sets out the detailed procedure for calculating this 10 year period

22 *O'Brien & Others v Independent Assessor* [2007] UKHL 10, para 23

> To put it no more strongly, justice, reasonableness and public policy surely dictate that no allowance should be made for so-called savings which the appellants were supposedly making while they were actually enduring the appalling wrong for which they are to be compensated.[23]

Decisions made by the assessor as to the amount of compensation to be awarded can be challenged by way of judicial review.

3.4 How to apply

Details of how to apply for compensation under the statutory scheme are available on the gov.uk website: see *Miscarriage of justice: claim compensation* [accessed 6 March 2015].

Individuals who require advice as to whether their case might be eligible under the statutory scheme should be advised to seek legal advice from an appropriate source: please see Library Standard Note 3207 *Legal help: where to go and how to pay*.

23 Ibid, para 82