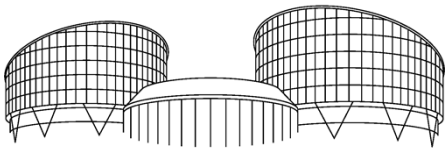

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

# CASE OF NEALON AND HALLAM v. THE UNITED KINGDOM

*(Applications nos. 32483/19 and 35049/19)*

JUDGMENT

Art 6 § 2 • Presumption of innocence • Refusal of compensation for a miscarriage of justice, following quashing of applicants' criminal convictions as "unsafe", for failing to meet new statutory test introduced after the judgment in *Allen v. the United Kingdom* [GC] • Art 6 § 2 applicable; no reason to depart from Court's conclusion in *Allen* on applicability • Case-law concerning cost issues and compensation claims by a former accused following acquittal revisited • Distinction between acquittals and discontinuances in relevant Court case-law not to be maintained • Defining criterion in all cases whether impugned reasoning and decisions of domestic courts or other authorities in subsequent linked proceedings amounted to an imputation of criminal liability • No right to compensation for a miscarriage of justice under Art 6 § 2 following the quashing of a criminal conviction • Respondent state free to decide how "miscarriage of justice" should be defined and to draw legitimate policy line as to eligibility for compensation following the quashing of a conviction, so long as compensation refusal did not impute criminal guilt to an unsuccessful applicant • Refusal of compensation claims in the instant case did not impute criminal liability to applicants

Prepared by the Registry. Does not bind the Court.

STRASBOURG

11 June 2024

*This judgment is final but it may be subject to editorial revision.*

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**In the case of Nealon and Hallam v. the United Kingdom,**

The European Court of Human Rights (Grand chamber), sitting as a Grand Chamber composed of:

Síofra O'Leary,
Georges Ravarani,
Marko Bošnjak,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Arnfinn Bårdsen,
Carlo Ranzoni,
Mārtiņš Mits,
Tim Eicke,
Péter Paczolay,
Lado Chanturia,
Ivana Jelić,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato,
Saadet Yüksel,
Mykola Gnatovskyy*, judges*,

and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 5 July 2023 and 27 March 2024,

Delivers the following judgment, which was adopted on the latter date:

# PROCEDURE

1. The case originated in two applications (nos. 32483/19 and 35049/19) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mr Victor Nealon, and a British national, Mr Sam Hallam ("the applicants"), on 14 June 2019 and 25 June 2019 respectively.

2. The first applicant was represented by Mr M. Newby, a lawyer practising in Doncaster with Quality Solicitors Jordans. The second applicant, who had been granted legal aid, was represented by Ms M. Willis Stewart KC, a lawyer practising in London with Birnberg Peirce, Solicitors. The United Kingdom Government ("the Government") were represented by their Agent, Ms S. Dickson of the Foreign, Commonwealth and Development Office.

3. The applicants alleged that the refusal of their claims for compensation for a miscarriage of justice under section 133(1ZA) of the Criminal Justice Act 1988, which followed the quashing of their criminal convictions by the Court of Appeal (Criminal Division), violated the presumption of innocence.

4. On 14 May 2020 the Government were given notice of the applications.

5. The President of the Fourth Section granted JUSTICE leave to make written submissions as a third party (Article 36 § 2 of the Convention and Rule 44 § 3).

6. On 7 February 2023 a Chamber of the Fourth Section, to which the applications had been allocated, decided to relinquish jurisdiction in favour of the Grand Chamber (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

8. The applicants and the Government each filed memorials on the admissibility and merits of the case. Third-party comments were received from JUSTICE and also from the Northern Ireland Human Rights Commission which had been granted leave by the President of the Grand Chamber to make written submissions as a third party (Article 36 § 2 of the Convention and Rule 44 § 3). The Government of Ireland did not seek to exercise their right to intervene (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 5 July 2023.

There appeared before the Court:

(a) *for the Government*

| | |
|---|---|
| MS S. DICKSON, | *Agent,* |
| MR J. STRACHAN KC, | |
| MR M. GULLICK KC, | *Counsel,* |
| MR M. RIMER, MS A. SAMEDI AND MS S. HEYWOOD, | *Advisers,* |

(b) *for the first applicant*

| | |
|---|---|
| MR M. STANBURY, | |
| MR D. POJUR, | *Counsel,* |
| MR M. NEWBY, | *Adviser*, |

(c) *for the second applicant*

| | |
|---|---|
| MR A. STRAW KC, | *Counsel*, |
| MS M. WILLIS STEWART KC, | |
| MR M. FOOT, | |
| MS J. KAMATH, | *Advisers.* |

The Court heard addresses by Mr Strachan KC, Mr Straw KC and Mr Stanbury.

# THE FACTS

## THE CIRCUMSTANCES OF THE CASE

10. The applicants were born in 1960 and 1987 respectively and are currently resident in the United Kingdom.

### A. Introduction

11. The present case is factually similar to that of *Allen v. the United Kingdom* ([GC], no. 25424/09, ECHR 2013). The applicants were convicted of criminal offences; those convictions were later quashed on the ground that they were "unsafe"; the prosecution did not seek a retrial; the applicants applied for compensation for a "miscarriage of justice"; and those applications were refused as the applicants had not satisfied the test in section 133 of the Criminal Justice Act 1988 ("the 1988 Act").

### B. The legislative background

#### *1. The meaning of "miscarriage of justice" in domestic law*

12. Section 133 of the 1988 Act provided for the payment of compensation where a person's conviction of a criminal offence was reversed on the ground that a new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice, unless the non-disclosure of the unknown fact was wholly or partly attributable to that person (see paragraph 51 below).

13. Prior to 2014 the meaning of "miscarriage of justice" had not been settled by the domestic courts (see paragraphs 56-79 below). In *R(Mullen) v. Secretary of State for the Home Department* ([2004] UKHL 18) (see paragraphs 56-62 below) Lord Steyn had expressed the view that "miscarriage of justice" only extended to the conviction of someone subsequently shown to be innocent. Lord Bingham of Cornhill, on the other hand, had doubted whether this was correct. Nonetheless, the House of Lords were unanimous in holding that the abuse of power that had led to the quashing of Mr Mullen's conviction did not fall within the definition of "miscarriage of justice", whatever the meaning of that phrase. The domestic proceedings in *Allen* (cited above) followed. In the Court of Appeal (*R (Allen) (formerly Harris) v Secretary of State for Justice* [2009] 2 All ER 1) Lord Justice Hughes, giving judgment for the court, understood Lord Bingham's approach in *R(Mullen)* to have included in the definition of "miscarriage of justice" situations where something had gone seriously wrong in the conduct of the trial. Although he expressed a preference for Lord Steyn's approach, he did not consider it necessary to resolve the

differences between Lord Steyn and Lord Bingham since even if Lord Bingham's approach were to be applied the case could not succeed.

14. In *R(Adams) v. Secretary of State for Justice* ([2011] UKSC 18) (see paragraphs 63-79 below) the Supreme Court, sitting as a panel of nine judges, held, by a majority, that Article 6 § 2 did not apply to applications under section 133 of the 1988 Act. The majority further held that "miscarriage of justice" included cases falling within the following categories:

1. where the fresh evidence showed clearly that the defendant was innocent of the crime of which he had been convicted; and
2. where the fresh evidence so undermined the evidence against the defendant that no conviction could possibly be based upon it;

and excluded from the common law definition the following categories:

3. where the fresh evidence rendered the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant; and
4. where something had 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.

*2. The Court's judgment in* Allen

15. In her application before this Court in 2009 Mrs Allen did not complain that section 133 of the 1988 Act was inherently incompatible with Article 6 § 2 of the Convention. Rather, she alleged that the reasons given by the High Court and the Court of Appeal for the refusal to award her compensation following the quashing of her conviction gave rise to doubts about her innocence and therefore violated the presumption of innocence.

16. The Grand Chamber accepted that Article 6 § 2 of the Convention was applicable to determinations of applications for compensation under section 133 of the 1988 Act but found that that Article had not been violated as the judgments of the High Court and the Court of Appeal did not demonstrate a lack of respect for the presumption of innocence. Although not called upon to consider the section 133 test in the abstract, the Court nevertheless stated that "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" (see *Allen*, cited above, § 133).

*3. The follow-up cases*

17. Following the handing down of the judgment of the Grand Chamber on 12 July 2013, the Fourth Section adopted inadmissibility decisions in three follow-up cases: *K.F. v. the United Kingdom* ((dec.), no. 30178/09, 3 September 2013); *Adams v. the United Kingdom* ((dec.), no. 70601/11, 12 November 2013); and *A.L.F. v. the United Kingdom* ((dec.), no. 5908/12,

12 November 2013). The applicants in all three cases had had their convictions quashed on the ground that they were unsafe, and their applications for compensation under section 133 of the 1988 Act were refused by the Secretary of State for Justice ("the Justice Secretary"), who did not accept that the facts showed beyond reasonable doubt that there had been a miscarriage of justice.

18. In both *Adams* and *A.L.F. v. the United Kingdom* the applicants had complained before the Court that the statutory test, as interpreted by the Supreme Court in *R(Adams)* (see paragraph 14 above), was in and of itself incompatible with Article 6 § 2 of the Convention. The Court rejected that argument. As it explained in *Adams* (cited above, §40)

> "40. All nine justices in the Supreme Court agreed that an acquittal in itself was not enough to demonstrate that a miscarriage of justice had occurred. In *Allen*, cited above, § 129 the Grand Chamber accepted that the domestic courts were entitled to conclude that more than an acquittal was required in order for a miscarriage of justice to be established, within the meaning of section 133, provided that they did not call into question the applicant's innocence. Lord Phillips explained that the test for a miscarriage of justice would be satisfied where a new fact so undermined the evidence against the defendant that no conviction could possibly be based upon it. That test was broadly approved by the other four Justices in the majority (see paragraph 24 and 26-29 above). The application of the test did not undermine the applicant's acquittal or treat him in a manner inconsistent with his innocence. The test did not oblige the court to comment on whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, it did not require the court to comment on whether the evidence was indicative of the applicant's guilt or innocence."

19. It concluded:

> "41. It is true that in the course of the Supreme Court judgment there was some reference to the question of innocence. In particular, the Justices discussed whether section 133 required that a claimant conclusively prove his innocence in order to be eligible for compensation. However, it is clear that this was roundly rejected by the majority of Justices in the case in favour of the broader test formulated by Lord Phillips. It is unfortunate that some of the language used in the judgment was liable to create confusion and an undesirable impression in the mind of the applicant as to the standard required for compensation. But in light of the clear test articulated by Lord Phillips, it should be apparent to any future claimant that questions of guilt and innocence are irrelevant to proceedings brought under section 133 of the 1988 Act."

20. In *A.L.F. v. the United Kingdom* the Court considered a reference to "innocence" in the refusal letter to have been "both unfortunate and unnecessary". It continued:

> "24. ... As the Court explained in *Adams*, cited above, § 41, it should be apparent from the judgment of the Supreme Court in *R(Adams)* that questions of guilt and innocence are irrelevant to proceedings brought under section 133 of the 1988 Act. Having regard to the foregoing, in order to avoid both any possible misconceptions in the minds of future claimants under section 133 and any suggestion of bringing into play the presumption of innocence under Article 6 § 2 of the Convention, it would be

more prudent to avoid such language altogether in future decisions made under this section."

*4. The subsequent legislative amendment*

21. Following the Court's judgment in *Allen*, section 133 of the 1988 Act was amended by the Anti-Social Behaviour, Crime and Policing Act 2014. The 2014 Act inserted a new section 133(1ZA) pursuant to which an applicant would be eligible for compensation if and only if the new or newly discovered fact showed beyond reasonable doubt that he or she did not commit the offence (see paragraph 80 below). The original wording in the Bill had required the new or newly discovered fact to show beyond reasonable doubt that the person was "innocent of the offence". However, during the legislative process concerns were raised (by, among others, the Joint Committee on Human Rights (see paragraphs 81-82 below) about the potential breach of Article 6 § 2 of the Convention and in light of those concerns "innocent of the offence" was replaced by "did not commit the offence".

22. This amendment is applicable in England, Wales and – in certain limited cases, where protected information is relevant to the application – in Northern Ireland (see paragraph 147 below). In Scotland, and in Northern Ireland, when protected information is not relevant to the application, section 133 of the 1988 Act continues to apply in its unamended form (see paragraphs 143 and 147 below).

## C. The factual background

*1. The quashing of the applicants' convictions*

23. The first applicant was convicted of attempted rape in 1997, primarily on the basis of identification evidence, and was sentenced to life imprisonment with a minimum term of seven years. In 2012 the Criminal Cases Review Commission referred his conviction to the Court of Appeal (Criminal Division) ("CACD") as a further analysis of the clothes the victim was wearing on the night of the attack had revealed DNA from an unknown male. The CACD allowed his appeal and quashed his conviction. While it noted that the prosecution's case had not been "demolished" by the fresh evidence, in the court's view its effect on the safety of the conviction was "substantial".

24. In 2004 the second applicant was convicted of murder, together with conspiracy to commit grievous bodily harm and violent disorder. The case against him had depended on the visual identification evidence of two witnesses. In 2011 his case was referred back to the CACD on the ground that new evidence had cast doubt on the identification evidence. The CACD allowed the second applicant's appeal and quashed his convictions. It considered that the cumulative effect of the new evidence had been to undermine the safety of those convictions. Although the second applicant had

argued that there was sufficient evidence to lead to the conclusion that he was innocent of the offences of which he was convicted the court was "not satisfied it would be appropriate to use that power [to state that he was innocent] on the facts of this case".

25. The first applicant served a total of seventeen years and three months of his sentence, while the second applicant served seven years and seven months.

*2. The applicants' claims for compensation*

26. Both applicants applied for compensation for a miscarriage of justice following the quashing of their convictions. Those applications were refused because the Justice Secretary was not satisfied that their convictions had been quashed on the ground that a new or newly discovered fact showed beyond reasonable doubt that they did not commit the offences. Both decision letters concluded with a statement to the effect that nothing in them was intended to undermine, qualify or cast doubt upon the decision to quash their convictions, and that they were presumed to be and remained innocent of the charges brought against them. The letter to the first applicant's representative further indicated that "[a]lthough the Crown Prosecution Service did not seek a retrial, the reasons for this included the circumstances 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".

*3. Proceedings before the Administrative Court*

27. The applicants sought permission to judicially review the decisions to refuse their applications for compensation, and their cases were listed together. They argued that section 133(1ZA) of the 1988 Act was incompatible with Article 6 § 2 of the Convention because it required them to prove their innocence in order to be eligible for compensation. They therefore sought a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998.

28. The Administrative Court granted their applications for permission to apply for judicial review but dismissed their claims. It considered itself bound by the judgment in *R(Adams)*, in which the Supreme Court had held that Article 6 § 2 of the Convention had no bearing on a decision for compensation under section 133 of the 1988 Act (see paragraph 14 above). The court readily accepted that, following *Allen* (cited above), one could argue that section 133(1ZA) offended against the presumption of innocence as it required convicted persons to demonstrate their innocence. Nevertheless, even assuming that Article 6 § 2 of the Convention was applicable to decisions under section 133 of the 1988 Act, it considered that such a conclusion would be wrong, since section 133(1ZA) did not in fact require an applicant for compensation to prove his or her innocence. Rather, the Justice

Secretary had to be satisfied of the link between the new fact and the applicant's innocence before he was required to pay compensation, and not of the applicant's innocence in a wider sense. Thus, the refusal of compensation on the basis that the statutory criteria were not established did not carry with it the implication that the person concerned was guilty.

*4. Proceedings before the Court of Appeal*

29. The Court of Appeal dismissed the applicants' appeal. It considered that *R(Adams)* was binding precedent that Article 6 § 2 of the Convention was not applicable to the operation of section 133 of the 1988 Act, whatever definition of "miscarriage of justice" was adopted (see paragraph 14 above); and that this remained the case regardless of what the Court had subsequently said in *Allen*. Even if Article 6 § 2 had been applicable it would not have accepted that section 133(1ZA) was incompatible with it since it did not require the applicant to prove his innocence generally. On the contrary, the key issue for the purpose of establishing eligibility for compensation under section 133(1ZA) was the effect of the new or newly discovered fact which had led to the conviction being quashed on appeal. The fact that the Justice Secretary was not persuaded beyond reasonable doubt by a new or newly discovered fact that an applicant was innocent did not entail the Justice Secretary casting doubt on his or her innocence generally. He was merely saying that the applicant's innocence had not been proved by the new or newly discovered fact.

*5. Proceedings before the Supreme Court*

30. The applicants were granted permission to appeal to the Supreme Court, which on 30 January 2019 dismissed their appeal by a majority of five Justices to two ([2019] UKSC 2).

31. The Supreme Court considered that the central issue in the appeal could be split into two broad questions: whether Article 6 § 2 of the Convention applied to all decisions on, or the criteria for, the award of compensation under section 133 of the 1988 Act; and, if and insofar as Article 6 § 2 was applicable, whether the definition of "miscarriage of justice" in section 133(1ZA) was compatible with it.

32. Turning to the first question, Lord Mance (with whom Lord Lloyd-Jones agreed) declined to follow the case-law of the Court, if and insofar as it went further than to preclude reasoning that suggested a defendant in criminal proceedings leading to an acquittal or discontinuance should have been convicted of the criminal offence with which he was charged. He stated:

> "47. ... I can ... accept that, once criminal proceedings have concluded with acquittal, or, indeed, a discontinuance, no court should in civil or other proceedings express itself in terms which takes issue with the correctness of the criminal acquittal or

discontinuance. Such an extension, achieving a degree of harmony with the approach in Strasbourg, seems at least workable and, of course, reflects what one would hope was anyway proper practice. But courts have often – in contexts not involving the pursuit of a criminal charge and using tools and language appropriate to such contexts – to engage with identical facts to those which have led to a criminal acquittal or discontinuance of criminal proceedings. In such circumstances, it is very commonly the case that the standard of proof will differ in the different contexts of criminal and other proceedings. It is, thus, entirely possible that a court may, in a context not involving the pursuit of any criminal charge, find on the balance of probabilities facts which could not be established beyond reasonable doubt in criminal proceedings. ... The real test is, or should be, whether the court in addressing the civil claim has suggested that the criminal proceedings should have been determined differently. If it has, it has exceeded its role.

48. If on the other hand, a court has, on the same facts as were in issue in criminal proceedings leading to an acquittal or discontinuance, determined a civil issue (or any issue other than a criminal charge) against the defendant, and has confined itself to reasoning relevant to that issue, that means, as I see it, that it has applied the law, rather than infringed article 6(2). I do not believe that either the press or the public is wholly ignorant that the criminal standard of proof may on occasions lead to acquittal or discontinuance, in circumstances where the commission of the offence could be established on the balance of probabilities. ...

49. Unfortunately, as it seems to me, the ECtHR has in a number of judgments condemned courts determining a civil issue for accurate descriptions of the elements of an offence constituting a tort simply because such elements also featured in past criminal proceedings. To require a civil court to tergiversate, by using words designed to obscure the fact that the law may find facts proved on a balance of probabilities which were not proved to the standard necessary for criminal conviction, does not assist either the law or the public or the defendant."

33. Lord Mance observed that a reading of the grounds on which the CACD allowed the applicants' appeals indicated that in each case it did so simply because the newly discovered facts made their convictions unsafe. In other words, the CACD's actual decision was, as in *Allen*, simply that their cases fell domestically within the third of the categories identified in *R(Adams)* (see paragraph 14 above). It was clear from *Allen* that there was nothing wrong with a criminal court, when setting aside a conviction, confining itself to indicating that "the new evidence, when taken with the evidence given at trial, 'created the possibility' that a jury 'might properly acquit' the defendant"; or explaining that "the evidence which was now available 'might, if it had been heard by the jury, have led to a different result'"; or expressing itself in terms which "did 'not begin to carry the implication' that there was no case for the applicant to answer"; or indicating that "there was 'no basis for saying' on the new evidence that there was no case to go to a jury". In his view,

"68. All these are ways of expressing a conclusion that a case falls within category (3). They amount to saying that some ground for suspicion remains. Yet it is clear from *Allen* that they are acceptable and that *Sekanina* does not have contrary effect. A central plank of the ECtHR's judgment in *Allen* is that there is nothing wrong with a refusal of compensation on the ground that the case falls within category (3). That is, as I read both the CACD's judgments, also the ground on which the CACD

allowed both the present appellants' appeals in the criminal proceedings, as well as the ground on which the Secretary of State disallowed their claims for compensation.

69. It follows, as the other side of the coin from what I have already said, that the right to compensation can legitimately be expressed to depend upon whether (adopting the terminology in *Adams*) the conviction was set aside on a ground falling within category (1) or (2). Logically, a defendant wishing not merely to have a conviction set aside, but also wishing to recover compensation, must, unless the case is one of the rare cases (see paras 32 to 34 above) in which the CACD expresses its judgment setting aside the conviction in terms going further than a conclusion that the conviction is unsafe, persuade the Secretary of State to go further. In the rare case where the CACD does express itself in terms stating that the defendant is innocent, that will in practice be conclusive. The Secretary of State could not realistically go behind such a statement. But in other cases, where the CACD has merely determined that the conviction is unsafe, it must be open to the state to resist a defendant's suggestion that the case falls within a different category that would entitle him to compensation, and for the Secretary of State to reach a conclusion on that basis. Otherwise, as soon as a defendant argues that the Secretary of State should go further than the CACD has gone and should view the circumstances as falling within a category for which the legislature has prescribed compensation, the state would have to accept this, and concede liability to pay compensation. This situation did not of course arise in *Allen*, because there was no attempt there by Ms Allen to bring her circumstances into any category other than that of category (3) within which the CACD had seen it as falling.

70. A defendant seeking compensation after the setting aside of his or her conviction by the CACD may therefore be required to show that the circumstances were not merely such that his conviction was unsafe. Using the terminology in *Adams*, the circumstances must be shown to fall within a higher category, which must, necessarily (and using the terminology in *Adams*), be either category (1) or category (2), or, since the enactment of section 133(1ZA), category (1) alone. Is there, in terms of compliance with the Convention, any sensible distinction between categories (1) and (2)? Category (1) is no more than a subset of category (2). If it is legitimate for the state to require a defendant to show at least that his or her case falls within category (2), on what basis could it be illegitimate for the state to require a defendant to show that it falls within category (1)? Putting the matter the other way around, the ECtHR has in para 133 in *Allen* implied that there would be an objection to requiring a defendant to show that the case fell within category (1). But it has not (at least in terms) addressed category (2). It may be that the ECtHR's passing reference in para 133 to the inappropriateness of Lord Steyn's test should be understood as embracing both categories (1) and (2). If so, then, as the preceding paragraph of this judgment shows, the effect would be largely to undermine the outcome of *Allen* itself. All that an applicant for compensation would need to do was assert this his or her claim fell into a higher category than category (3), and the state would be precluded from asserting the contrary, because to do so would be to infringe the 'presumption of innocence'.

71. ... If, to use the ECtHR's further words in *Allen*, para 136, it demonstrates 'a lack of respect for the presumption of innocence which [a defendant] enjoys in respect of the criminal charge ... of which she has been acquitted' to refuse compensation on the ground that the defendant has not shown innocence, it would presumably also demonstrate a lack of respect for the presumption of innocence to refuse it on the ground that the defendant had not shown that she was not only acquitted, but also that there was no evidence upon the basis of which she could possibly have been convicted. The two situations are distinct as a matter of domestic criminal law, and the legislature has distinguished between them for the purposes of compensation. But to distinguish

between them in terms of the Convention and in relation to the question of infringement of the presumption of innocence, would seem to do no more than add another fine and unconvincing distinction, in an area where the application of the Convention already appears too full of unsatisfactory and unsatisfying distinctions and uncertainties."

34. Finally, with regard to the distinction in the Court's case-law between acquittals and discontinuances, Lord Mance made the following observations:

"40. The rationale of any distinction between ('true') acquittals and discontinuance is not easy to understand. If the presumption of innocence is the key, one would have thought it equally applicable in both situations, or possibly even more so in a situation where the state has not felt able to pursue any criminal charges at all and has therefore discontinued. Be that as it may be, the application of any such distinction is itself fraught with difficulties – as is evident by a comparison of *Sekanina* itself with *Allen*. ...

...

42. It appears that [in *Sekanina*] the ECtHR not only disagreed with the Austrian Court of Appeal's analysis of the trial and jury record, but also held it to be illegitimate, in terms of the Convention and in the context of compensation, for the Austrian courts to embark in the first place on any consideration whether suspicions remained in the light of the acquittal. Contrast the ECtHR's recent judgment in *Allen*, where the ECtHR upheld the decision of the Secretary of State and of the courts judicially reviewing his decision that it was legitimate to refuse compensation on the ground that the CACD's setting aside of Ms Allen's conviction merely established was that the new evidence 'might' have led the jury to a different result - meaning that the conviction was unsafe. The jury's acquittal in *Sekanina* was evidently analysed as a 'true' acquittal or exoneration, whereas the CACD's was not. But what then would be the position if a criminal judge or court were (as can happen) to acquit a defendant on the basis that the prosecution had not established its case to the requisite criminal standard and/or that the defendant was entitled to the benefit of the doubt? Why should such an outcome at first instance be treated any differently from the outcome before the CACD on appeal in *Allen*? And, if the two situations are alike, then the potential applicability of *Sekanina* must, in the light of *Allen*, be understood as severely limited in scope."

35. Lord Mance concluded that the appeals should be dismissed, since nothing in section 133(1ZA) or in the Justice Secretary's rejection of the applicants' claims for compensation involved any suggestion that they should have been convicted of the criminal offence with which they were charged.

36. Lady Hale considered that Article 6 § 2 was engaged, but did not accept that the Court would automatically find that it had been breached. She added:

"78. ... the Strasbourg court has drawn a distinction between (a) claims by a defendant for such things as costs or compensation arising out of the termination of a criminal case against him in his favour, either by acquittal or discontinuance, and (b) civil claims by or on behalf of third party victims against a former defendant in criminal proceedings which have been determined in his favour. In category (b) cases, where the parties are different, the standard of proof is different, the admissible evidence may also be different, and liability is not dependent upon criminal proceedings having been brought at all, the Strasbourg court has clearly accepted that the civil claim may be determined differently from the criminal proceedings without violating article 6(2). The important thing is the language adopted by the court when deciding the civil claim, as illustrated

in the contrasting decisions in *Ringvold v Norway* (Application No 34964/97), and *Y v Norway* (2003) 41 EHRR 87. Lord Mance suggests that 'the real test is, or should be, whether the court in addressing the civil claim has suggested that the criminal proceedings should have been determined differently' (para 47). I agree, and I share his regret that, in *Orr v Norway* (Application No 31283/04), judgment of 15 May 2008, the Chamber, by a narrow majority, appear to have asked more of the civil court than this. While accepting that an acquittal in criminal proceedings is no bar to a civil claim for compensation based on the same facts, they appear to have demanded that the court hearing the civil claim phrase its decisions in less than fully transparent language. This is contrary to the rule of law: courts must always be able to explain their decisions fully, clearly and honestly. The one thing they must avoid is suggesting, in civil proceedings, that the defendant should have been convicted of the criminal offence. But I take comfort from the fact that this was the decision of a Chamber of the court, and by the narrow margin of four to three.

79. This is not a category (b) case, but Lord Mance detects signs that the Strasbourg court might also be prepared, despite the breadth of its language in *Allen v United Kingdom* (2013) 63 EHRR 10, to adopt an approach to category (a) cases which in practice requires merely that the court determining the defendant's claim for costs or compensation refrain from any suggestion that he should have been convicted of the offence. There is enough in the evolution of the court's jurisprudence to suggest that, for the most part and with some limited exceptions, that is in fact what they are doing."

37. She added:

"81. The cases before us are also cases, like *Allen*, in which the fresh evidence rendered the conviction unsafe, in the sense that, had it been available at trial, a reasonable jury might or might not have convicted the defendant. The Grand Chamber found no violation in the case of *Allen*."

38. Lord Wilson believed that the appeals placed the court in a deeply uncomfortable position. While it afforded "profound respect" to the decisions of the Court, he was nevertheless persuaded that

"85. ... in its rulings upon the extent of the operation of article 6(2) of the Convention, the ECtHR has, step by step, allowed its analysis to be swept into hopeless and probably irretrievable confusion. An analogy is to a boat which, once severed from its moorings, floats out to sea and is tossed helplessly this way and that."

39. In his view, the presumption of innocence in Article 6 § 2 had no further role following an acquittal; the presumption was for the purposes of the *criminal law* and an acquitted defendant had no need for a mere presumption since, for the purposes of the criminal law his or her innocence had become an irrebuttable fact. However, the Court's jurisprudence had divorced the word "innocent" from its context and "blurred the crucial distinction between guilt for the purposes of the criminal law and guilt for other purposes". Lord Wilson therefore considered that the line of Convention jurisprudence culminating in *Allen* was "not just wrong but incoherent". While he reluctantly agreed with Lord Reed that if Article 6 § 2 had the meaning ascribed to it by the Court, section 133(1ZA) of the 1988 Act was not compatible with it, he concluded that the Supreme Court should not adopt the meaning ascribed to Article 6 § 2 by the Court.

40. In his judgment Lord Hughes stated:

> "100. The central reality which has to be addressed by any legal test for the scope of article 6(2) is that the same factual issues which have to be decided in a criminal trial or investigation in order to reach a verdict of guilty or not guilty, or a decision as to prosecution, may also have to be decided for other legal purposes.
>
> ...
>
> 102. The three legal systems operating in the United Kingdom all depend upon [the] marked and principled difference between proof beyond reasonable doubt as a minimum for conviction and punishment and proof on the balance of probabilities in most other areas of adjudication. ...
>
> 103. Once the difference in standard of proof is recognised, it is plain that those proceedings to which the civil standard apply simply cannot be governed also by the criminal standard, nor thus by the verdict of the criminal court, even if the same factual issues arise, and even if the evidence is the same. Discussions about the scope of article 6(2) must necessarily accommodate this fact."

41. Lord Hughes then considered a long line of Convention jurisprudence. With regard to *Sekanina v. Austria* (25 August 1993, Series A no. 266-A) he said the following:

> "111. There no doubt is a difference between discontinuance and acquittal, especially in systems (such as the English) where the first may sometimes be no bar to resumption of prosecution whereas the second virtually always is. But if the governing principle is the presumption of innocence in article 6(2) there seems no reason why that presumption should apply any the less to a person against whom a prosecution has been discontinued than to one who has been acquitted after trial. Both are equally entitled to claim that they cannot be convicted until proved guilty according to law. The reasoning in *Sekanina* and *Rushiti* is thus perhaps rather more pragmatic than dependent on the principle of the presumption of innocence. At all events, it is completely unexplained, either in these cases or later, and accordingly its frequent repetition since adds nothing to it."

42. Like Lord Mance, Lord Hughes expressed concern that the Grand Chamber's statements of principle in *Allen* at para 104 would make it impossible for judges trying, for example, a civil claim for damages by a rape complainant, or care proceedings in which the issue was an allegation of abuse made against an acquitted accused, to give judgment once the accused had been acquitted. He continued:

> "120. The present case is not of course one of a civil claim for damages coming after a criminal prosecution. But consideration of such a case, together with the plain difficulties which have attended the Strasbourg court's conscientious efforts to extend the applicability of article 6(2), demonstrates that article cannot sensibly apply beyond the criminal trial and the investigation which precedes it. The objective of not undermining an acquittal which underlies the suggested gloss on article 6(2) – see para 99(b) above – can and should properly be maintained but it means that the acquitted accused must be recognised as unconvicted, immune from punishment by the state and from characterisation as a criminal, but not that he escapes all consequences of the ordinary application of his country's rules as to evidence and the standard of proof outside criminal trials. Powerful pleas to that effect by Judge De Gaetano in both *Ashendon and Jones v United Kingdo*m (2012) 54 EHRR 13 and *Allen*, and by

Judge Power in *Bok v The Netherlands* (Application No 45482/06), 18 January 2011, properly reflect the correct analysis of article 6(2)."

43. Of the limited right to public compensation for those prosecuted and acquitted, he said the following:

"124. It is easy to understand why section 133(1ZA) can at first sight be seen as a reversal of the criminal onus of proof, and thus as inconsistent with article 6(2). In reality, however, it is no such thing. By the time section 133(1ZA) comes into consideration the erstwhile accused is by definition no longer facing any criminal charge in any sense, whether the autonomous one applied in the Strasbourg jurisprudence or any other. His conviction has been quashed. He is in no danger of conviction or punishment. Nor is he in any danger of any official body treating him as if he were still convicted or liable to punishment. All that is happening is that he is seeking to bring himself within the (legitimately) restricted eligibility requirements for compensation. That does not put his guilt or innocence in issue; he remains unconvicted and unpunished whether eligible or not, and no one will be entitled to say, if he cannot prove on the balance of probabilities that he is eligible, that he is guilty; at most all anyone could say is that his exoneration has not conclusively been proved. The terms of article 14(6) of the ICCPR, which section 133 seeks to implement in English law, make plain that eligibility depends on it being conclusively shown that a miscarriage of justice has occurred. A decision that this has not conclusively been shown is not at all the same as a finding of guilt, nor does it in any sense undermine the quashing of the conviction."

44. While Lord Hughes acknowledged that the court should follow any clear and constant jurisprudence of the Court, he did not consider that in this instance such clear and constant jurisprudence existed.

45. Lord Reed and Lord Kerr dissented. Lord Reed, with whom Lord Kerr agreed, considered, as regards the applicability of Article 6 § 2 of the Convention, that the Grand Chamber's conclusion in *Allen* was carefully considered and based on a detailed analysis of the relevant case-law. In this regard, it was consistent with a line of authorities going back decades. Moreover, it was intended to provide authoritative guidance and it had subsequently been followed in numerous judgments. It did not involve any principle of English law, or any oversight or misunderstanding. He therefore considered that decisions taken under section 133 fell within the ambit of Article 6 § 2.

46. Lord Reed also considered that section 133(1ZA) was incompatible with Article 6 § 2 of the Convention. Contrary to the lower courts, Lord Reed viewed the distinction between a requirement that innocence be established, and a requirement that innocence be established by a new or newly discovered fact and nothing else, as unrealistic. He continued:

"184. ... A person who can make a valid application under section 133 is, of necessity, someone whose conviction has been quashed because of the impact of a new or newly discovered fact: that follows from the terms of section 133(1). In most cases which satisfy that criterion, there will not be any other reason for the quashing of the conviction. A decision by the Secretary of State that the new or newly discovered fact does not establish the person's innocence does not, therefore, usually leave open a realistic possibility that he or she has been acquitted for some other reason, which that

decision leaves unaffected. On the contrary, the implication of the decision is likely to be that, although the new or newly discovered fact has led to the quashing of the conviction, the person's innocence has not been established. The decision therefore casts doubt on the innocence of the person in question and undermines the acquittal.

185. The idea that there is a meaningful distinction between assessing whether innocence has been established by a new or newly discovered fact, and assessing whether innocence has been established in a more general sense, also appears to me to be unrealistic for another reason. Normally, at least, the significance of a new piece of evidence can only be assessed in the context of the evidence as a whole. That is illustrated by the present cases. The photograph of Mr Hallam in [H's] company does not in itself tell one anything about his guilt or innocence of the murder. It is only when considered in the context of the alibi evidence that its significance becomes apparent. In Mr Nealon's case, the presence of an unknown male's DNA on the victim's underwear tells one nothing in itself about Mr Nealon's guilt or innocence of an attempted rape. It is only in the context of her evidence about the behaviour of her attacker and her contact with other males on the day in question, and the evidence of other witnesses eliminating the most likely alternative explanations of the presence of the DNA, that its significance can be assessed. There is no material difference, in these situations, between asking whether the applicant's innocence has been established by the new or newly discovered fact, and asking whether his innocence has been established."

47. Lord Reed observed that while in *Allen* the Grand Chamber did not consider that the refusal of compensation in cases falling within category 3 in *R(Adams)* was necessarily incompatible with Article 6 § 2 of the Convention, a problem arose where compensation was confined to persons in category (1) (as opposed to categories (1) and (2)) (for an explanation of the categories, see paragraph 14 above). In such a case, in his view, the Justice Secretary was effectively required to decide whether persons whose convictions were quashed because of fresh evidence had established that they were innocent. In Lord Reed's view, if criminal guilt was to be assessed, he or she should be entitled under the Convention to the protections afforded in criminal proceedings, including the presumption of innocence.

48. In reaching this conclusion, Lord Reed said the following

"190. Counsel for the Secretary of State submitted ... that a violation of article 6(2) was avoided by means of the Secretary of State's statement, in each of the decision letters, that nothing in the letter was intended to undermine, qualify or cast doubt upon the decision to quash the conviction, and that the applicant was presumed to be and remained innocent of the charge brought against him. I am unable to agree that this statement ensures that article 6(2) is respected. The application of a test which in substance infringes the presumption of innocence is not rendered acceptable by the addition of words intended to avoid a conflict with article 6(2), if the overall effect is nevertheless to undermine a previous acquittal. The point is illustrated by the case of *Hammern v Norway*, where the operation of a statutory test which required the applicant to prove that he did not perpetrate the acts forming the basis of the charges was incompatible with article 6(2), notwithstanding a statement in the decision that 'I should like to stress that the refusal of a compensation claim does not entail that the previous acquittal is undermined or that the acquittal is open to doubt'. The European court commented at para 48 that it was 'not convinced that, even if presented together with such a cautionary statement, the impugned affirmations were not capable of calling into

> doubt the correctness of the applicant's acquittal, in a manner incompatible with the presumption of innocence'. That comment is equally apposite in the present case."

# RELEVANT LEGAL FRAMEWORK AND PRACTICE

## A. The United Kingdom

### *1. Quashing a conviction*

49. Pursuant to section 2(1) of the Criminal Appeal Act 1968 ("the 1968 Act") the Court of Appeal would allow an appeal against conviction if it thought that the conviction was "unsafe".

50. Section 2(3) of the 1968 Act provided that an order quashing a conviction would, except where a retrial was ordered, operate as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal. A person whose conviction was quashed was therefore in the same position as a person who had actually been acquitted: *R v. Barron* [1914] 2 KB 570.

### *2. Compensation for a "miscarriage of justice"*

#### (a) Section 133 of the 1988 Act

51. Section 133(1) of the 1988 Act provided 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."

52. The question whether there was a right to compensation under section 133 was to be determined by the Justice Secretary following an application by the person concerned.

53. Pursuant to section 133(5), the term "reversed" was to be construed as referring to a conviction having been quashed, *inter alia*, on an appeal out of time or following a reference to the CACD by the Criminal Cases Review Commission (unless the person was to be subject to a retrial, in which case the conviction was not to be treated as " reversed " unless and until the person was acquitted of all offences at the retrial or the prosecution decided not to proceed with the retrial).

54. Section 133(6) provided that a person suffered punishment as a result of a conviction when sentence was passed for the offence of which he or she was convicted.

55. The term "miscarriage of justice" was not defined in the 1988 Act when originally enacted.

**(b) Judicial interpretation of "miscarriage of justice"**

*(i)* R(Mullen) v. Secretary of State for the Home Department

56. In *R(Mullen)* there was a divergence of views in the House of Lords between Lord Bingham and Lord Steyn as to the proper construction of section 133 of the 1988 Act. However, it was not necessary on the facts of the case for the House of Lords to resolve those differences.

57. Lord Bingham noted that section 133 was enacted in order to give effect to the obligation under Article 14(6) of the International Covenant on Civil and Political Rights ("the ICCPR" – see paragraphs 83-89 below), which was directed at ensuring that defendants were fairly tried. He continued:

> "8. ... In quashing Mr Mullen's conviction the Court of Appeal (Criminal Division) condemned the abuse of executive power which had led to his apprehension and abduction in the only way it effectively could. But it identified no failure in the trial process. It is for failures of the trial process that the Secretary of State is bound, by section 133 and article 14(6), to pay compensation. On that limited ground I would hold that he is not bound to pay compensation under section 133."

58. He hesitated to accept the submission of the Secretary of State to the effect that section 133, reflecting Article 14(6) of the ICCPR, obliged him to pay compensation only when a defendant, finally acquitted in circumstances satisfying the statutory conditions, was shown beyond reasonable doubt to be innocent of the crime of which he had been convicted. In light of his conclusion that no compensation was payable, however, it was not necessary to decide this point.

59. Lord Steyn, on the other hand, observed that section 133 was modelled on Article 14 § 6 of the ICCPR, as was Article 3 of Protocol No. 7 to the Convention. He reviewed several judgments of this Court in which a violation of Article 6 § 2 had been found in respect of compensation proceedings where the applicants had been acquitted at trial but did not consider them relevant to the issue under consideration. He concluded:

> "44. In my view the European jurisprudence cited throws no light on the question whether article 6(2) of the convention justifies an expansive interpretation of article 3 of Protocol No. 7, or the corresponding question in respect of article 14(2) and 14(6) of the ICCPR. In my view the principled analysis already set out must prevail. Article 14(6) of the ICCPR (and therefore section 133 of the 1988 Act), are in the category of lex specialis and the general provision for a presumption of innocence does not have any impact on it."

60. Lord Steyn then turned to examine the interpretation of Article 14(6) of the ICCPR on its own terms. He noted that:

> "45. ... there was no overarching purpose of compensating all who are wrongly convicted. In cases of a wrongful conviction quashed on an appeal out of time an indispensable pre-condition is that '(1) a new or newly discovered fact (2) shows conclusively that there has been a miscarriage of justice' (numbering added). If there is no new or newly discovered fact, but simply, for example, a recognition that an earlier

dismissal of an appeal was wrong, the case falls outside article 14(6). That is so, however palpable the error in the first appellate decision may have been, and however severe the punishment that the victim suffered unjustly. These considerations demonstrate that the fundamental right under article 14(6) was unquestionably narrowly circumscribed."

61. He continued:

"46. The requirement that the new or newly discovered fact must show conclusively (or beyond reasonable doubt in the language of section 133) 'that there has been a miscarriage of justice' is important. It filters out cases where it is only established that there may have been a wrongful conviction. Similarly excluded are cases where it is only probable that there has been a wrongful conviction. These two categories would include the vast majority of cases where an appeal is allowed out of time ... I regard these considerations as militating against the expansive interpretation of 'miscarriage of justice' put forward on behalf of Mr Mullen. They also demonstrate the implausibility of the extensive interpretation ...: it entirely erodes the effect of evidence showing 'conclusively that there has been a miscarriage of justice'. While accepting that in other contexts 'a miscarriage of justice' is capable of bearing a narrower or wider meanings, the only relevant context points to a narrow interpretation, viz the case where innocence is demonstrated."

62. Thus he concluded:

"56. ... 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 [to Protocol No. 7]. This is the international meaning which Parliament adopted when it enacted section 133 of the 1988 Act."

*(ii)* R(Adams) v. Secretary of State for Justice

63. As indicated in paragraph 14 above, in *R(Adams)* four categories of case were considered as candidates for satisfying the statutory definition of "miscarriage of justice".

64. The Supreme Court held, by a majority of five Justices to four, that the true meaning of "miscarriage of justice" included cases in categories (1) and (2) only: that is, cases where the fresh evidence showed clearly that the defendant was innocent of the crime of which he had been convicted (category 1); and where the fresh evidence so undermined the evidence against the defendant that no conviction could possibly be based upon it (category 2). The minority would have restricted its meaning to category (1) cases only.

65. Lord Phillips, in the majority, considered the primary object of section 133 to be clear, namely to provide entitlement to compensation to a person who had been convicted and punished for a crime that he or she did not commit. But he considered that a subsidiary object of the section was that compensation should not be paid to a person who had been convicted and punished for a crime that he did commit.

66. Lord Phillips examined a number of arguments for and against the limitation of the phrase "miscarriage of justice" to category 1 cases, noting in

particular that it would exclude from entitlement to compensation those who no longer seemed likely to be guilty, but whose innocence was not established beyond reasonable doubt. He considered this a "heavy price to pay" for ensuring that no guilty person was ever the recipient of compensation. He therefore favoured an interpretation of "miscarriage of justice" that included category 2 cases. In particular, he stated that

> "55. ... **A new fact will show 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.** This is a matter to which the test of satisfaction beyond reasonable doubt can readily be applied. This test will not guarantee that all those who are entitled to compensation are in fact innocent. It will, however, ensure that when innocent defendants are convicted on evidence which is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt. I find this a more satisfactory outcome than that produced by category 1. I believe that it is a test that is workable in practice and which will readily distinguish those to whom it applies from those in category 3. It is also an interpretation of miscarriage of justice which is capable of universal application."

67. Lord Hope, also in the majority, believed that section 133

> "96. ... clearly includes cases where the innocence of the defendant is clearly demonstrated. But [Article 14(6) of the International Covenant on Civil and Political Right 1966 ("ICCPR"), on which section 133 was based] does not state in terms that the only criterion is innocence. Indeed, the test of 'innocence' had appeared in previous drafts but it was not adopted. I would hold, in agreement with Lord Phillips ... that it includes also cases where the new or newly discovered fact shows that the evidence against the defendant has been so undermined that no conviction could possibly be based upon it. In that situation it will have been shown conclusively that the defendant had no case to answer, so the prosecution should not have been brought in the first place.
>
> 97. There is an important difference between these two categories. It is one thing to be able to assert that the defendant is clearly innocent. Cases of that kind have become more common and much more easily recognised since the introduction into the criminal courts, long after article 14(6) of the ICCPR was ratified in 1976, of DNA evidence. It seems unlikely that the possibility of demonstrating innocence in this way was contemplated when the test in article 14(6) was being formulated ... The state should not, of course, subject those who are clearly innocent to punishment and it is clearly right that they should be compensated if it does so. But it is just as clear that it should not subject to the criminal process those against whom a prosecution would be bound to fail because the evidence was so undermined that no conviction could possibly be based upon it. If the new or newly discovered fact shows conclusively that the case was of that kind, it would seem right in principle that compensation should be payable even though it is not possible to say that the defendant was clearly innocent. I do not think that the wording of article 14(6) excludes this, and it seems to me that its narrowly circumscribed language permits it."

68. He therefore concluded that category 1 plainly fell within the scope of section 133. He further held that category 2 also fell within the scope of that section.

69. Lady Hale agreed that a "miscarriage of justice" in section 133 should be interpreted as proposed by Lord Phillips as the phrase was clearly capable

of bearing a wider meaning than conclusive proof of innocence. She explained:

> "115. As I understand it, Lord Phillips' formulation ... would limit the concept to a person who should not have been convicted because the evidence against him has been completely undermined ... I agree with Lord Phillips that the object of this particular exercise is to compensate people who cannot be shown to be guilty rather than to provide some wider redress for shortcomings in the system."

70. Lord Kerr also preferred the analysis of Lord Bingham in *R(Mullen)* to that of Lord Steyn, noting:

> "172. ... I cannot accept that the section imposes a requirement to prove innocence. In the first place, not only does such a requirement involve an exercise that is alien to our system of criminal justice, that system of justice does not provide a forum in which assertion of innocence may be advanced. An appeal against conviction heard by the Court of Appeal Criminal Division is statutorily required to focus on the question whether the conviction under challenge is safe. In a number of cases, evidence may emerge which conclusively demonstrates that the appellant was wholly innocent of the crime of which he or she was convicted but that will inevitably be incidental to the primary purpose of the appeal. The Court of Appeal has no function or power to make a pronouncement of innocence ..."

71. Lord Judge, dissenting, preferred the analysis of Lord Steyn. He explained his position as follows:

> "246. In the context of a statutory provision reflecting the international obligations undertaken by the United Kingdom, it would be productive of confusion for the phrase 'miscarriage of justice' to be analysed by reference to the many different ways in which, looking at our own statutes which enable convictions to be quashed, and the language used, sometimes loosely, in the course of numerous judgments bearing on these questions. The phrase reflects an 'autonomous' concept, in which the words 'miscarriage of justice' reflect the international obligations of the United Kingdom under article 14(6).
>
> 247. Like article 14(6), section 133 distinguishes the reversal of the conviction (or a pardon) and a miscarriage of justice. Within the section itself, as with article 14(6), these concepts are distinct. Even if the remaining pre-conditions to the payment of compensation are established, the reversal of the conviction is an essential prerequisite to but is not conclusive of the entitlement to compensation. In short, for the purposes of section 133 the reversal of the conviction and the consequent revival of the legal presumption of innocence is not synonymous with a miscarriage of justice. Therefore before compensation is payable under the statutory scheme more than the reversal of the conviction is required.
>
> 248. The requirement is that a 'miscarriage of justice' must be demonstrated 'beyond reasonable doubt'. In my view the use of this phrase was deliberate and significant. The phrase is not relevant to the evidential question whether the conviction has been reversed and it is not directed to any individual feature or aspect of the investigation or trial processes. If the reversal of the conviction alone were sufficient, that fact would be proved beyond reasonable doubt by the court record, and if any specific feature of the investigation or trial processes were relevant, appropriate provision could readily have been made in section 133 itself. Instead the phrase describes the characteristics or attributes of the 'miscarriage of justice' which must be established. The word 'conclusively' in article 14(6) was not repeated. Rather the familiar description of the

standard of proof in criminal cases and, significantly in the context of a claim for the payment of compensation (normally a civil claim), the standard normally applied to the prosecution in the criminal justice process was imposed on the defendant. For this purpose the balance of probabilities was expressly ignored. Accordingly, for section 133 to apply, following a conviction of an offence which was proved beyond reasonable doubt, the emergence of a new or newly discovered fact should demonstrate not only that the conviction was unsafe, or that the investigative or trial processes were defective, but that justice had surely miscarried. In the present context, the ultimate and sure miscarriage of justice is the conviction and incarceration of the truly innocent.

249. This leads me to the conclusion that as a matter of construction the operation of the compensation scheme under section 133 is confined to miscarriages of justice in which the defendant was convicted of an offence of which he was truly innocent. In my judgment nothing less will do, and no alternative or half-way house or compromise solution consistent with this clear statutory provision is available."

72. Lord Brown (with whom Lord Rodgers agreed) agreed with Lord Judge but wished to share some additional thoughts of his own, so troubled was he by the fact that theirs was the minority view. He said:

"271. The critical question for decision here, of course, is what precisely is meant in this context by 'a miscarriage of justice'. As to this, whilst recognising that the expression has an 'autonomous' meaning, I share the view expressed in several of the judgments that there is no real assistance to be derived here from any of the extrinsic material, for example, the travaux or other states' practices. Rather, as Lord Bingham suggested in *R(Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, 27, para 9(2): 'It may be that the expression [miscarriage of justice] commended itself because of the latitude in interpretation which it offered.' That being so, it was perfectly open to the UK to introduce legislation intended to compensate only those shown to be clearly innocent of the crime of which they had been convicted and in this connection I see no reason to ignore the explanatory report relating to article 3 of Protocol 7 to the European Convention on Human Rights (an article almost precisely reproducing the language of article 14(6)) which, at para 25, states:

'The intention is that states would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be acknowledgment that the person concerned was clearly innocent.'

True, the UK never ratified Protocol 7 and I am far from suggesting that the explanatory report shows plainly that section 133(1) is to be construed in the way para 25 suggests. But it does surely show that this is both a permissible view to take of the extent of the article 14(6) obligation undertaken by the UK and a perfectly possible construction of section 133(1) itself."

73. Lord Brown agreed with Lord Steyn in *R(Mullen)* that "miscarriage of justice" in the context of section 133 meant the wrongful conviction of an innocent accused. Compensation therefore went only to those ultimately proved innocent, and not to all those whose convictions were adjudged unsafe. For him, the prominent factor weighing against the category 2 test was the fact that it would result in very substantial compensation for many defendants who were in truth guilty. However, another centrally important consideration militating against a category 2 construction of section 133 was the difficulty – perhaps even the impossibility – of reconciling this with the

language of the section as a whole, and most especially with its requirement that the new facts establish a miscarriage of justice "beyond reasonable doubt". In Lord Brown's view it was nonsensical to suggest that the category 2 test was one that could sensibly be satisfied (or not) beyond reasonable doubt.

74. He concluded:

> "281. Naturally I recognise that the application of the innocence test will exclude from compensation a few who are in fact innocent. Even on the majority's test, of course, some who are innocent will be excluded. That, however, seems to me preferable to compensating a considerable number (although mercifully not so many as would be compensated on the category 3 approach) who are guilty. After all, this whole compensation scheme operates by creating only a narrow and exceptional class who qualify. The claimant qualifies only by producing a new or newly discovered fact. And only if his conviction is quashed on a reference or an appeal out of time. (It will, indeed, often be a matter of chance whether an appeal is out of time – the lawyers may simply have missed the time limit.) Why should the state not have a scheme which compensates only the comparatively few who plainly can demonstrate their innocence – and, as I have shown, compensate them generously – rather than a larger number who may or may not be innocent?"

75. Lord Walker agreed with both Lord Judge and Lord Brown.

76. Seven of the Justices further held that Article 6 § 2 of the Convention had no bearing on the interpretation of section 133 of the 1988 Act as section 133 constituted a *lex specialis*.

77. Lord Phillips stated:

> "58. ... 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 or not the claimant was in fact innocent. The presumption of innocence will not be infringed."

78. Lord Hope examined the judgments of this Court and held that the principle that was applied was that it was not open to the State to undermine the effect of an acquittal. However, he considered that Article 14(6) ICCPR did not 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 was necessary to find out what happened. He was of the view that the system created by Article 14(6) did not cross the "forbidden boundary". He noted that the procedure laid down in section 133 provided for a decision to be taken by the executive on the question of entitlement to compensation, which was entirely separate from the proceedings in the criminal courts.

79. Lord Clarke considered that the court hearing and determining a claim for compensation under section 133(1) must not say or do anything inconsistent with the claimant's acquittal. However, he was satisfied that if the analysis set out in the judgment was adopted, there was no risk of its doing

so. The question in each case was whether the claimant had proved beyond reasonable doubt that the new or newly discovered fact demonstrated that there was a miscarriage of justice on the basis that no reasonable jury, properly directed, could convict him. The trial of that question in no way affected or impugned the acquittal of the claimant as provided by section 2 of the Criminal Appeal Act 1968.

**(c) The amendment to section 133 of the 1988 Act**

80. Section 133 of the 1988 Act was amended by the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"). The amendment introduced 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)."

**(d) The observations of the Joint Committee on Human Rights**

81. The Joint Committee on Human Rights was appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom. It consisted of twelve members, appointed from both the House of Commons and the House of Lords, and its work included scrutinising every Government Bill for its compatibility with human rights.

82. In considering the human rights compatibility of what was then the Anti-social Behaviour, Crime and Policing Bill, the Joint Committee made the following observations:

> "In our view it is now clear beyond doubt from the recent judgment of the Grand Chamber of the European Court of Human Rights in the case of *Allen v UK* that the proposed new test in clause 143 of the Bill is incompatible with the right to be presumed innocent in Article 6(2) ECHR. The Court accepted that more than a mere acquittal is required in order for a miscarriage of justice to be established, but subject to an important proviso: 'provided always that they did not call into question the applicant's innocence'. Application of the proposed new test for a miscarriage of justice (if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent) will inevitably call into question the applicant's innocence where the application is refused. The real substance of the concern about the presumption of innocence is that a rejection of an application for compensation for a miscarriage of justice on the ground that the new or newly discovered fact does not establish the person's clear innocence suggests that the person may still have been guilty of the offence even though that has not been proved beyond reasonable doubt.
>
> In our view, requiring proof of innocence beyond reasonable doubt as a condition of obtaining compensation for wrongful conviction is incompatible with the presumption of innocence, which is protected by both the common law and Article 6(2) ECHR. We

recommend that clause 143 be deleted from the Bill because it is on its face incompatible with the Convention."

## B. International Legal Materials

### *1. International Covenant on Civil and Political Rights 1966*

83. Article 14(2) of the ICCPR provided that:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

84. Article 14(6) provided:

> "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."

85. In *W.J.H. v. the Netherlands* (Communication No. 408/1990, UN Doc. CCPR/C/45/D/408/1990(1992)) and *W.B.E. v. The Netherlands* (Communication No. 432/1990, UN Doc. CCPR/C/46/D/432/1990(1992)) the United Nations Human Rights Committee ("the UNHRC") observed that Article 14(2) applied only to criminal proceedings and not to proceedings for compensation following an acquittal.

86. In *Dumont v. Canada* (Communication No. 1467/2006, UN Doc. CCPR/C/98/D/1467/2006(2010)) the author – whose conviction was quashed when new evidence came to light which "would not permit a reasonable jury acting on correct instructions to find [him] guilty beyond all reasonable doubt" – claimed to be the victim of a violation by Canada of Article 14(6). The UNHRC said the following:

> "23.4 The Committee notes the State party's argument that it had not been established that the author did not commit the crime in question and that his factual innocence had therefore not been proven. The State party submits that it is of the view that a miscarriage of justice within the meaning of article 14 (6) of the Covenant occurs only when the convicted person is in fact innocent (factual innocence) of the offence with which he is charged. It also explains that in the Canadian penal system, with its common-law tradition, the subsequent acquittal of a convicted person does not imply innocence, unless expressly stated by the court due to evidence to that effect.
>
> 23.5 In this case, without prejudice to the Committee's position on the accuracy of the State party's interpretation of article 14, paragraph 6, of the Covenant and its implications for the presumption of innocence, it observes that the author's conviction was primarily based on the victim's statements and that the doubts expressed by the victim after March 1992 concerning her assailant led to the reversal of the author's conviction on 22 February 2001. It further notes that, in the event of acquittal of the person prosecuted, the State party has no procedure for launching a new investigation in order to review the case and to possibly identify the real perpetrator. The Committee therefore considers that the author should not be held responsible for this situation.

23.6 Consequently, owing to this gap, and to delays in the civil proceedings, which have been pending for nine years, the author has been deprived of an effective remedy to enable him to establish his innocence, as required by the State party in order to obtain the compensation provided for in article 14, paragraph 6. The Committee therefore notes a violation of article 2, paragraph 3, read in conjunction with article 14, paragraph 6, of the Covenant."

87. In its General Comment No. 32 on Article 14, published on 23 August 2007, the UNHRC said, in respect of the presumption of innocence:

"30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence." (footnotes omitted)

88. In respect of the right to compensation for a miscarriage of justice, it said, in so far as relevant:

"53. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgment becomes final, or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice." (footnotes omitted)

89. In its concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland (17 August 2015) the UNHRC expressed concern that the new test for miscarriage of justice in section 133(1ZA) of the 1988 Act might not be in compliance with article 14(6) of the Covenant.

### *2. Article 3 of Protocol No. 7 to the Convention*

90. Pursuant to Article 3 of Protocol No. 7:

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

91. The United Kingdom has not signed or acceded to Protocol No. 7.

92. The Explanatory Report to Protocol No. 7 was prepared by the Steering Committee for Human Rights and submitted to the Committee of Ministers of the Council of Europe. It explained at the outset that the report itself

> "... does not constitute an instrument providing an authoritative interpretation of the text of the Protocol, although it might be of such a nature as to facilitate the understanding of the provisions contained therein."

93. As regards Article 3 of Protocol No. 7, the report noted, insofar as relevant, that:

> "23. ... the article applies only where the person's conviction has been reversed or he has been pardoned, in either case on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice – that is, some serious failure in the judicial process involving grave prejudice to the convicted person. Therefore, there is no requirement under the article to pay compensation if the conviction has been reversed or a pardon has been granted on some other ground. ...
>
> 25. In all cases in which these preconditions are satisfied, compensation is payable 'according to the law or the practice of the State concerned'. This does not mean that no compensation is payable if the law or practice makes no provision for such compensation. It means that the law or practice of the State should provide for the payment of compensation in all cases to which the article applies. The intention is that States would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent. The article is not intended to give a right of compensation where all the preconditions are not satisfied, for example, where an appellate court had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge."

## C. Law and Practice in the Contracting States on the award of compensation following the quashing of a criminal conviction, and the concept of "miscarriage of justice"

94. In at least thirty-four Contracting States compensation proceedings following the quashing of a criminal conviction were not related either to the main criminal proceedings or to the retrial proceedings. The claim was brought either administratively and/or to the civil and administrative courts.

95. In eight Contracting States (Andorra, Cyprus, Greece, Ireland, Malta (solely in connection with Article 3 of Protocol No. 7 to the Convention), the Netherlands, Poland and Spain) the legislation and/or the domestic case law recognised and applied the concept of "miscarriage of justice" or concepts that might reasonably be considered as substantially similar. In each of these eight States it was possible to claim compensation for a miscarriage of justice.

96. In at least twenty-one Contracting States (Austria, Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Italy, Moldova, Monaco, North Macedonia, Norway, Poland, Romania, Serbia, Slovenia, Spain,

Sweden, Türkiye and Ukraine) there was no "proved innocent" criterion as such in domestic law.

97. However, criminal justice systems varied greatly according to each Contracting State and its legal traditions. Consequently, it was difficult to compare the organisation in different States of compensation proceedings following an acquittal or the quashing of a conviction.

# THE LAW

## I. JOINDER OF THE APPLICATIONS

98. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment (Rule 42 § 1 of the Rules of Court).

## II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

99. The applicants complained that the rejection of their claims for compensation for a miscarriage of justice on the basis of the test in section 133(1ZA) of the 1988 Act, which followed the quashing of their convictions by the Court of Appeal (Criminal Division), breached their right to be presumed innocent. They invoked Article 6 § 2 of the Convention, which reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

100. The Government contested that argument.

### A. Preliminary observations regarding Article 6 § 2 of the Convention

101. Article 6 § 2 safeguards the right to be "presumed innocent until proved guilty according to law". In the context of a criminal trial, it acts as a procedural guarantee, imposing requirements in respect of, *inter alia*, the burden of proof; legal presumptions of fact and law; the privilege against self-incrimination; pre-trial publicity; and premature expressions, by the trial court or by other public officials, of a defendant's guilt (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 93, ECHR 2013, with references therein).

102. However, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the Court has, over time, developed a "second aspect" to the presumption of innocence, which comes into play after the criminal proceedings have concluded, either with an acquittal or a discontinuance.

103. The Court's case-law on the second aspect of Article 6 § 2 of the Convention has developed incrementally. The first cases before the Court

concerned either orders that a defendant pay costs, or the refusal of a defendant's claim for compensation for pre-trial detention or wrongful conviction, upon the discontinuance of criminal proceedings (see, for example, *Minelli v. Switzerland*, 25 March 1983, Series A no. 62; *Englert v. Germany*, 25 August 1987, Series A no. 123; *Nölkenbockhoff v. Germany*, 25 August 1987, Series A no. 123; and *Lutz v. Germany*, 25 August 1987, Series A no. 123). However, in most of these cases the impugned order was made either before criminal proceedings had concluded (see *Minelli*, in which the Court found that the applicant was still "charged with a criminal offence" at the relevant time), or concomitantly with the decision to stay the proceedings, and by the same court (see *Englert* and *Lutz*, both cited above).

104. *Sekanina v. Austria* (25 August 1993, Series A no. 266-A) was one of the first cases in which the Court found Article 6 § 2 of the Convention to be applicable in its second aspect to rulings on costs and compensation handed down some months after the criminal proceedings had ended (see also *Rushiti v. Austria*, no. 28389/95, 21 March 2000; *Lamanna v. Austria*, no. 28923/95, 10 July 2001; *Weixelbraun v. Austria*, no. 33730/96, 20 December 2001; and *Vostic v. Austria*, no. 38549/97, 17 October 2002). It was also in this case that the Court distinguished between an acquittal and a decision which was not "on the merits", holding that "the voicing of suspicions regarding an accused's innocence was conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final" (see *Sekanina*, cited above, § 30).

105. Following *Sekanina*, Article 6 § 2 was found to be applicable in cases outside the sphere of costs issues and claims for compensation by former accused. In *Allen* (cited above, § 98), the Court provided the following list of such cases:

> "(a) a former accused's obligation to bear court costs and prosecution costs (see *Minelli v. Switzerland*, 25 March 1983, §§ 30-32, Series A no. 62, and *McHugo v. Switzerland* (dec.), no. 55705/00, 12 May 2005);
>
> (b) a former accused's request for compensation for detention on remand or other inconvenience caused by the criminal proceedings (see *Englert*, cited above, § 35; *Nölkenbockhoff v. Germany*, 25 August 1987, § 35, Series A no. 123; *Sekanina*, cited above, § 22; *Rushiti*, cited above, § 27; *Mulaj and Sallahi v. Austria* (dec.), no. 48886/99, 27 June 2002; *O. v. Norway*, no. 29327/95, §§ 33-38, ECHR 2003-II; *Hammern*, cited above, §§ 41-46; *Baars v. the Netherlands*, no. 44320/98, § 21, 28 October 2003; *Capeau v. Belgium* (dec.), no. 42914/98, 6 April 2004; *Del Latte v. the Netherlands*, no. 44760/98, § 30, 9 November 2004; *A.L. v. Germany*, no. 72758/01, §§ 31-33, 28 April 2005; *Puig Panella*, cited above, § 50; *Tendam*, cited above, §§ 31 and 36; *Bok v. the Netherlands*, no. 45482/06, §§ 37-48, 18 January 2011; and *Lorenzetti v. Italy*, no. 32075/09, § 43, 10 April 2012);
>
> (c) a former accused's request for defence costs (see *Lutz v. Germany*, 25 August 1987, §§ 56-57, Series A no. 123; *Leutscher v. the Netherlands*, 26 March 1996, § 29, *Reports* 1996-II; *Yassar Hussain*, cited above, § 19; and *Ashendon and Jones v. the*

*United Kingdom* (revision), nos. 35730/07 and 4285/08, §§ 42 and 49, 15 December 2011);

(d) a former accused's request for compensation for damage caused by an unlawful or wrongful investigation or prosecution (see *Panteleyenko v. Ukraine*, no. 11901/02, § 67, 29 June 2006, and *Grabchuk v. Ukraine*, no. 8599/02, § 42, 21 September 2006);

(e) the imposition of civil liability to pay compensation to the victim (see *Ringvold v. Norway*, no. 34964/97, § 36, ECHR 2003-II; *Y v. Norway*, no. 56568/00, § 39, ECHR 2003-II; *Orr*, cited above, §§ 47-49; *Erkol v. Turkey*, no. 50172/06, §§ 33 and 37, 19 April 2011; *Vulakh and Others v. Russia*, no. 33468/03, § 32, 10 January 2012; *Diacenco v. Romania*, no. 124/04, § 55, 7 February 2012; *Lagardère v. France*, no. 18851/07, §§ 73 and 76, 12 April 2012; and *Constantin Florea v. Romania*, no. 21534/05, §§ 50 and 52, 19 June 2012);

(f) the refusal of civil claims lodged by the applicant against insurers (see *Lundkvist v. Sweden* (dec.), no. 48518/99, ECHR 2003-XI, and *Reeves v. Norway* (dec.), no. 4248/02, 8 July 2004);

(g) the maintenance in force of a child care order, after the prosecution decided not to bring charges against the parent for child abuse (see *O.L. v. Finland* (dec.), no. 61110/00, 5 July 2005);

(h) disciplinary or dismissal issues (see *Moullet v. France* (dec.), no. 27521/04, 13 September 2007; *Taliadorou and Stylianou*, cited above, § 25; *Šikić*, cited above, §§ 42-47; and *Çelik (Bozkurt) v. Turkey*, no. 34388/05, § 34, 12 April 2011); and

(i) the revocation of the applicant's right to social housing (see *Vassilios Stavropoulos v. Greece*, no. 35522/04, §§ 28-32, 27 September 2007)."

106. In doing so, it made it clear that following the discontinuance of criminal proceedings the presumption of innocence required that the lack of a person's criminal conviction be preserved in any other proceedings of whatever nature; and also that the operative part of an acquittal judgment must be respected by any authority referring directly or indirectly to the criminal responsibility of the interested party (see *Allen*, cited above, § 102, with references therein).

107. In the years since the Court handed down its judgment in *Allen*, Article 6 § 2 of the Convention has been found to be applicable in proceedings concerning, *inter alia*:

(a) a formerly convicted person's request for compensation for a miscarriage of justice following the quashing of his conviction (see *K.F. v. the United Kingdom*, (dec.), no. 30178/09, 3 September 2013, *Adams v. the United Kingdom,* (dec.), no. 70601/11, 12 November 2013, and *A.L.F. v. the United Kingdom*, (dec.), no. 5908/12, 12 November 2013);

(b) the imposition of civil liability to pay compensation to a victim, where the victim was a public authority (see *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020 and *Rigolio v. Italy*, no. 20148/09, 9 March 2023);

(c) the imposition of civil liability to pay a victim's legal fees (see *Fleischner v. Germany*, no. 61985/12, 3 October 2019);

(d) the confiscation of the proceeds of crime and/or assets of a criminal nature (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018);

(e) a decision on a convicted prisoner's probationary release (see *Müller v. Germany*, no. 54963/08, 27 March 2014);

(f) an order to pay administrative fines (see *Kapetanios and Others v. Greece*, nos. 3453/12 and 2 others, 30 April 2015);

(g) the re-opening of criminal proceedings following the finding of a violation by the Court (see *Dicle and Sadak v. Turkey*, no. 48621/07, 16 June 2015);

(h) the granting of an amnesty (see *Béres and Others v. Hungary*, nos. 59588/12 and 2 others, 17 January 2017 and *Felix Guţu v. the Republic of Moldova*, no. 13112/07, 20 October 2020);

(i) sentencing remarks (see *Bikas v. Germany*, no. 76607/13, 25 January 2018);

(j) a conviction for a repeat offence while an appeal against the original offence was still pending (see *Kangers v. Latvia*, no. 35726/10, 14 March 2019);

(k) a claim brought by an insurance company against an insured driver (see *Ilias Papageorgiou v. Greece*, no. 44101/13, 10 December 2020); and

(l) enforcement proceedings brought by a tax authority (see *Melo Tadeu v. Portugal*, no. 27785/10, 23 October 2014).

108. However, regardless of the nature of the case, the Court has maintained that the principal aim of the presumption of innocence in the second aspect is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged (see *Allen*, cited above, § 94, with references therein; see also, among many other examples, *Kapetanios and Others*, cited above, § 83, *Dicle and Sadak*, cited above, § 54, and *Bikas*, cited above, § 31). That is because those persons are innocent in the eyes of the law and must be treated in a manner consistent with that innocence (see *Allen*, cited above, § 103). To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the applicability of Article 6 § 2 in these cases (ibid.).

109. In the second aspect, the person's reputation and the way in which he or she is perceived by the public may also be at stake (see *Allen*, cited above, § 94 with references therein).

## B. Admissibility

### *1. The parties' submissions*

#### (a) The Government

110. The Government argued that Article 6 § 2 of the Convention should not extend to decisions or criteria under the domestic system for determining entitlement to compensation in section 133 of the 1988 Act, when that scheme was properly applied. In their view there were cogent reasons for departing from *Allen* on this point, and preferring the analysis of the High Court, the Court of Appeal and the majority of the Supreme Court in the present cases. The domestic courts had correctly focused on the nature of the task under the statutory scheme and its proper application. The task required of the Justice Secretary had not involved the determination of a criminal charge and was not part of the criminal process. Rather, it was a civil and administrative task carried out in a separate confidential process before the Justice Secretary (rather than a court) which did not require the decision-maker to question an applicant's innocence or undermine an acquittal. Unlike the Austrian scheme under consideration in *Sekanina*, *Rushiti* and *Weixelbraun* (all cited above), the statutory test in section 133 required the decision-maker to decide on compensation in accordance with criteria which focused only on the specific effect of a new or newly discovered fact, rather than making a general assessment of guilt or innocence. The Government conceded that Article 6 § 2 might be applicable if a public official went beyond the statutory scheme and suggested that an applicant should have been convicted, but that did not happen in either of the cases at hand.

111. Alternatively, the Government argued that proper recognition of the compensation proceedings in section 133 of the 1988 Act under a separate, confidential, civil administrative process meant that there was not a sufficient "link" with the criminal process to make Article 6 § 2 applicable.

112. The Government further argued that the Court's analysis in *Allen* should be revisited in light of the decision of the United Nations Human Rights Council ("UNHRC") in *W.J.H. v. the Netherlands* (Communication No. 408/1990, UN Doc. CCPR/C/45/D/408/1990(1992) – see paragraph 85 above), which made it clear that the presumption of innocence in Article 14(2) of the International Covenant on Civil and Political Rights ("ICCPR") applied only to criminal proceedings and not proceedings for compensation.

113. The Government confirmed that they were not asking the Court to revisit decisions in which it had held Article 6 § 2 to be applicable to different schemes where there was a much closer connection between a decision on compensation and an acquittal (for example, where the decision was taken by the same court, or the scheme by its very nature required an assessment of factual guilt or innocence).

**(b) The applicants**

114. The applicants invited the Grand Chamber to affirm both its statement of the general principles in *Allen*, and the conclusions reached by the Grand Chamber on the facts of that case. Those principles were based on a thorough analysis of the Court's jurisprudence, and had been repeated in several cases (see, for example, *Vella v. Malta*, no. 69122/10, 11 February 2014; *Müller*, cited above; *Karczyński v. Poland* (dec.), no. 18460/15, 23 May 2017; *Bikas*, cited above; *Fleischner*, cited above; *Farzaliyev*, cited above; *Pasquini v. San Marino (no. 2)*, no. 23349/17, 20 October 2020; *Milachikj v. North Macedonia*, no. 44773/16, 14 October 2021 and *Diamantopoulos v. Greece* (dec.), no. 68144/13, 8 March 2022).

115. The conclusions reached by the Grand Chamber in respect of section 133 had also been followed in three subsequent cases (*K.F. v. the United Kingdom*, *Adams*, and *A.L.F. v. the United Kingdom*, all cited above). This was because the compensation proceedings under the section 133 scheme were entirely contingent on the resolution of the prior criminal proceedings and the Justice Secretary was required, in determining this type of application, to closely analyse the judgment of the Court of Appeal (Criminal Division) ("CACD"), to engage in a review of the evidence before the CACD, to focus on the very factual foundation for the CACD's decision, and to determine for himself whether that foundation meant that there had been a miscarriage of justice. There was an obvious risk that this would appear to undermine the presumption that the CACD's acquittal meant that the applicant was innocent. That risk was increased by the new test introduced by section 133(1ZA), which required the Justice Secretary specifically to focus on whether the evidence showed that the applicant did not commit the offence. As such, the Justice Secretary was required to comment on the applicant's innocence.

116. For the applicants, a distinction had to be drawn between cases such as the present, where the compensation proceedings were closely linked to the criminal proceedings (being "consequences and necessary concomitants of", or "a direct sequel to" the conclusion of the criminal proceedings), and civil proceedings, which tended to be separate and distinct from the criminal proceedings. In the former, there was a particular danger that the subsequent proceedings might undermine the outcome of the criminal proceedings. However, Article 6 § 2 of the Convention would not normally apply to civil proceedings unless the reasoning of the Court contained a statement imputing criminal guilt. It would therefore be the statement itself that created the link.

**(c) The third party interventions**

*(i) JUSTICE*

117 JUSTICE referred to the interpretation given by the UNHRC to Article 14 of the ICCPR. It pointed out that while in *W.J.H. v. the*

*Netherlands*, (cited above; see paragraphs 85 and 112 above) the UNHRC had held that the presumption of innocence in Article 14(2) ICCPR applied only to criminal proceedings and not proceedings for compensation, in the latter case of *Dumont v. Canada* (Communication no 1467/2006, UN Doc. CCPR/C/98/D/1467/2006(2010) – see paragraph 86 above) it had declined to confirm this finding. JUSTICE acknowledged that the UNHRC had not yet held that the right to compensation for a miscarriage of justice found in Article 14(6) had to be read in accordance with the presumption of innocence in Article 14(2), but argued that this might be a possibility in a future case.

118. JUSTICE further noted that in 2015 the UNHRC had provided concluding observations on the seventh periodic review of the United Kingdom's compliance with the ICCPR in which it expressed concern that the test in section 133(1ZA) of the 1988 Act "may not be in compliance with Article 14(6) of the Covenant" (see paragraph 89 above).

*(ii) The Northern Ireland Human Rights Commission ("NIHRC")*

119. The NIHRC adopted and endorsed the minority views expressed by Lord Reed and Lord Kerr in the Supreme Court (see paragraphs 45-48 above) that Article 6 § 2 of the Convention was applicable to decisions taken under section 133(1ZA) of the 1988 Act.

### *2. The Court's assessment*

#### (a) General principles

120. In *Allen* (cited above, § 99) the Court indicated that in a trio of early cases it had found in favour of the applicability of Article 6 § 2 of the Convention despite the absence of a pending criminal charge because the rulings on the applicants' entitlement to costs and compensation were "consequences and necessary concomitants of", or "a direct sequel to", the conclusion of the criminal proceedings (see *Englert*, cited above, § 35; *Nölkenbockhoff*, cited above, § 35; and *Lutz*, cited above, § 56). Similarly, in a later series of cases the Court concluded that Austrian legislation and practice "link[ed] the two questions – the criminal responsibility of the accused and the 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 on the former", resulting in the applicability of Article 6 § 2 to the compensation proceedings (see *Sekanina*, cited above, § 22; *Rushiti*, cited above, § 27; and *Weixelbraun*, cited above, § 24).

121. As the Court pointed out in *Allen*, in its early case-law a distinction was made between cases concerning claims for compensation by a former accused, and cases concerning the victim's right to compensation from a former accused. In the former situation, the compensation claim "not only followed the criminal proceedings in time, but was also tied to those proceedings in legislation and practice, with regard to both jurisdiction and

subject matter", thus creating a link between the two sets of proceedings with the result that Article 6 § 2 was applicable. In contrast, in the latter situation such a link would only exist if the decision on civil compensation contained a statement imputing criminal liability to the former accused (see *Allen*, cited above, §§ 100-101, with references therein).

122. However, in *Allen* the Court held that the scope of Article 6 § 2 in its second aspect extended beyond these two categories (see *Allen*, cited above, § 98, reproduced at paragraph 105 above). It went on to confirm that whenever the question of the applicability of Article 6 § 2 arose in the context of subsequent proceedings, the applicant had to demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings. Such a link was likely to be present, for example, where the subsequent proceedings required examination of the outcome of the prior criminal proceedings and, in particular, where they obliged 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 (see *Allen*, cited above, § 104).

123. It should be reiterated that on numerous occasions the Court has found that the necessary link had not been established. In some cases, this was because the outcome of the criminal proceedings was not decisive for the subsequent proceedings and the latter was therefore not a direct sequel to the former (see *Ringvold v. Norway*, no. 34964/97, § 41, ECHR 2003-II, concerning an award of compensation to the victim of an offence; see also *Lundkvist v. Sweden* (dec.), no. 48518/99, ECHR 2003-XI, concerning civil proceedings against an insurance company; *Moullet v. France* (dec.), no. 27521/04, 13 September 2007, concerning a finding by the *Conseil d'Etat* of a breach of disciplinary rules; and *O.L. v. Finland* (dec.), no. 61110/00, 5 July 2005, concerning the maintenance of a childcare order).

124. In *N.A. v. Norway* (no. 27473/11, §§ 49-52, 18 December 2014) the Court, referring to both *Ringvold* (cited above, § 41) and *Allen* (cited above, § 97), found that Article 6 § 2 of the Convention was not applicable in its second aspect to an award of compensation to the applicant's children after the applicant and her husband were acquitted of gross neglect because the national court's reasoning for awarding compensation did not amount to the establishment of criminal guilt on the applicant's part, and there were no other links between the criminal proceedings and the compensation proceedings as to justify extending the scope of Article 6 § 2 to cover the latter.

125. More recently, the Court has found that an applicant's request to lift an interim order that he leave the family home was not a sequel to the criminal proceedings against him relating to the sexual abuse of his daughter (see *Kaiser v. Austria*, (dec.), no. 15706/08, 13 December 2016, with further references, notably to *Allen*, cited above, § 104, and *O.L. v. Finland*); that

Article 6 § 2 of the Convention was not applicable in its second aspect to an unsatisfactory appraisal following an acquittal of charges of bribery, where the language used in the appraisal was restricted to the applicant's professional conduct and did not refer, comment on or otherwise question the outcome of the criminal proceedings which had been brought against him (see *Yildiz v. Turkey*, (dec.), no. 65182/10, 24 January 2017); and that the necessary link had not been established between discontinued criminal proceedings against persons suspected of membership of terrorist organisations, who were allegedly killed in terrorist attacks, and their relatives' claims for additional compensation payable to victims of terrorism (see *Martinez Agirre and Others v. Spain*, (dec.), nos. 75529/16 and 79503/16, 29 June 2019). The Court has also expressed doubts as to whether such a link would exist between a criminal investigation into the applicants in respect of their daughter's disappearance and their subsequent civil claim against, *inter alia*, a police officer involved in the investigation who had written a book and participated in an accompanying documentary in which he accused them of being involved in the disappearance (see *McCann and Healy v. Portugal*, no. 57195/17, 20 September 2022).

**(b) Application of the general principles to the facts of the case at hand**

126. The Government pointed out (in paragraph 110 above) that the determination of a claim for compensation under section 133(1ZA) of the 1988 Act was a civil and administrative task carried out in a separate confidential process before the Justice Secretary (rather than a court) which did not require the decision-maker to question an applicant's innocence or undermine an acquittal. Rather, the decision-maker was required to decide on compensation in accordance with criteria which focused only on the specific effect of a new or newly discovered fact, rather than making a general assessment of guilt or innocence.

127. However, in *Allen* the Grand Chamber considered the scheme under section 133 of the 1988 Act (prior to its 2014 amendment) and, on the basis of the evidence before it, was satisfied that the applicant had demonstrated the existence of the necessary link between the criminal proceedings and the subsequent compensation proceedings. This was due to the fact that it was the subsequent reversal of the conviction which triggered the right to apply for compensation for a miscarriage of justice (see *Allen*, cited above, § 108). Further, in order to examine whether the cumulative criteria in section 133 were met, the Justice Secretary and the courts in judicial review proceedings were required to have regard to the judgment handed down by the CACD. It was only by examining this judgment that they could identify whether the reversal of the conviction was based on new evidence and whether it gave rise to a miscarriage of justice (see *Allen*, cited above, § 107).

128. The 2014 Act inserted a new section 133(1ZA) pursuant to which an applicant would be eligible for compensation if and only if the new or newly

discovered fact showed beyond reasonable doubt that he or she did not commit the offence (see paragraph 21 above). The Government have not suggested that the section 133 scheme was amended in any other material way. As such, the compensation proceedings continue to require examination of the outcome of the prior criminal proceedings and, in particular, the judgment of the CACD. The Court emphasises that in compensation proceedings the decision-maker's focus is on the impact of the new or newly discovered fact, a point which may be central to any assessment of the merits were Article 6 § 2 to be deemed applicable. However, he or she is also required to engage in an evaluation of the evidence, insofar as necessary, in order to assess whether that fact showed beyond reasonable doubt that the applicant did not commit the offence. In this regard, the present case is distinguishable from those discussed at paragraphs 123-125 above, in which the courts, in the subsequent proceedings, were not called upon to examine the outcome of the prior criminal proceedings and/or to engage in a review or evaluation of the evidence in the criminal file.

129. The Court therefore sees no reason to depart from its conclusion in *Allen* regarding the applicability of Article 6 § 2 of the Convention. The present application cannot therefore be rejected under Article 35 § 3 (a) as incompatible *ratione materiae* with the provisions of the Convention.

#### (c) Conclusions on admissibility

130. The Court, having found Article 6 § 2 of the Convention to be applicable to the facts of the present case, notes that the applications are not inadmissible on any other grounds. They must therefore be declared admissible.

## C. Merits

### *1. The parties' submissions*

#### (a) The applicants

131. According to the applicants, even though the CACD's function was not to determine "innocence", an acquittal had to be presumed to mean that the acquitted person was innocent, since otherwise it would mean nothing more than that there was reasonable doubt about his guilt. That presumption was necessary to (i) protect the reputation of the acquitted person from the serious stigma associated with an official indication that he or she might be guilty of the relevant offence, (ii) maintain the integrity of and public confidence in the justice system, and (iii) ensure that Article 6 § 2 was practical and effective. To preserve that presumption, the acquitted person had to be treated in compensation proceedings in a manner that was consistent with his innocence. Those proceedings could not apply an approach which

degraded the meaning of the acquittal by implying that the acquitted person was not innocent.

132. For the applicants, a requirement that the determination of the compensation proceedings did not call into question a person's innocence did not simply mean that the decision-maker was prohibited from indicating that the person was guilty to the criminal standard of a criminal offence. That was the prohibition applicable in the context of a civil claim for damages. Section 133 proceedings had to be more sensitive to the person's innocence because they were intimately linked to the criminal proceedings.

133. In the applicants' opinion, the test laid down by section 133(1ZA) of the 1988 Act, and its application in their cases, violated Article 6 § 2 of the Convention. Each applicant had been required to satisfy the Justice Secretary that the factual basis for the CACD's acquittal demonstrated that he was innocent. That assumed that the foundation for the acquittal did not establish his innocence, and thus conflicted with the presumption, arising from the acquittal, that those facts proved the applicant to be innocent. Similarly, the Justice Secretary had rejected each application for compensation by concluding, in substance, that the factual basis for the acquittal did not prove that the applicant was innocent. That was inconsistent with the CACD's decision to acquit the applicants on the basis of those same facts and with the presumption that the acquittal signified innocence. Consequently, there were two official decisions on the same facts: one by the CACD to acquit, presumed to mean that the applicant was innocent, and one by the Justice Secretary, to the effect that he was not innocent. Because of the inseparable link between the compensation proceedings and the applicants' acquittal, this degraded the meaning of the acquittals and called into question the applicants' innocence. This was made clearer by the reasoning of the Grand Chamber in paragraph 133 of *Allen*, where it stated that "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". According to the applicants, there was no material difference between Lord Steyn's test, condemned by the Grand Chamber, and the new test in section 133(1ZA) of the 1988 Act.

134. For the applicants, there was a distinction between the category 1 and category 2 tests, as identified by the Supreme Court in *R(Adams)* (see paragraph 14 above). Category 2 only required the Justice Secretary to determine whether the new fact so undermined the evidence that no conviction could be based on it, whereas category 1 required the Justice Secretary to determine whether the applicant was innocent. While a person who satisfied the category 2 test might also happen to be innocent, the Justice Secretary was not required to make any determination as to whether he or she was or was not innocent. That is why the Court was able to find the previous version of section 133 to be compatible with Article 6 § 2 of the Convention.

135. Moreover, the substantive decisions were not rendered acceptable by the caveats inserted at the end of the decisions to the effect that the applicants were presumed to be and remained innocent of the charges. In *Hammern v. Norway* (no. 30287/96, § 48, 11 February 2003) a statutory test which had required the applicant to prove he did not perpetrate the acts forming the basis of the charges was held to be incompatible with Article 6 § 2, even though "a deliberate effort was made to avoid any conflict with Article 6 § 2 in the interpretation of the statutory provision concerned". Language was critical, but it had to be understood in the context of the substantive test being applied, and the Article 6 § 2 safeguards had to be practical and effective. That would not be achieved if a substantive decision by the Justice Secretary, that was inconsistent with the acquittal and the presumption of innocence that should flow from it, could be saved by a post-script.

136. With regard to *Sekanina*, the applicants acknowledged that "there may be understandable reasons for making [the] distinction [between an acquittal and a discontinuance], in some contexts". However, it was their contention that they were each "acquitted on the merits". Where, as here, the CACD quashed a conviction and there was no retrial, the subject was treated for all purposes as if he had been acquitted. Unlike Ms Allen, in the present cases the decision not to order a retrial was not because the applicants had already served their sentences, but rather, in reality, because there was no longer any realistic prospect of conviction. In substantive acquittal cases like these, a stricter standard was imposed by Article 6 § 2 in respect of subsequent proceedings, and the Justice Secretary was prohibited from raising suspicions about the acquitted person's innocence. Here, the Justice Secretary's refusal of compensation, in substance, raised suspicions about each applicant's innocence because it amounted to a conclusion that the factual foundation for the acquittal – that is, that the new or newly discovered facts on which the acquittal was based – did not show that he was innocent.

137. Finally, the applicants argued that the requirement that the Justice Secretary focus on the new or newly discovered facts that founded the quashing of the conviction was, if anything, more problematic than if the question was not linked to the factual basis for the CACD's decision. The Justice Secretary was required to decide whether or not the very facts which founded the quashing of the conviction showed that the person was innocent. That meant that a closer link existed between the Justice Secretary's decision and the quashing of the conviction, and there was therefore a greater danger that the decision could degrade the person's innocence.

**(b) The Government**

138. If the Court considered Article 6 § 2 of the Convention to be applicable to a decision taken or to the criteria under section 133 of the 1988 Act, the Government argued that its function in this context should be to ensure that a public authority was not entitled to suggest that an acquitted

defendant should have been convicted of the offence in question on the application of a criminal standard of proof (see, for example, *Englert*, cited above and *Bok v. the Netherlands*, no. 45482/06, 18 January 2011). A public authority should not take issue with the correctness of the criminal acquittal or discontinuance in subsequent proceedings. However, given the need for Article 6 § 2 to operate harmoniously with Article 3 of Protocol No. 7 and the analogous provisions of the ICCPR (see *Allen*, cited above, § 128), the function of Article 6 § 2 should not extend further than that. The Government therefore contended that section 133 of the 1988 Act was not incompatible with Article 6 § 2 since the refusal of compensation did not involve any conclusion that an applicant ought to have been convicted and no such conclusions were reached or articulated in either of the present applicant's cases. In fact, the refusals were not even capable of amounting to the "voicing of suspicions" about the applicants.

139. The Government pointed out that the applicants' reliance on *Allen* was derived from a single sentence in which the Grand Chamber had indicated that "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" (see *Allen*, cited above, § 133). However, this observation appeared to have been directed at the dangers of a scheme requiring an applicant to demonstrate his or her innocence generally. Section 133(1ZA) did not require an applicant for compensation to do this and to suggest otherwise would be to mischaracterise the statutory provision. Proof of innocence in and of itself would not give rise to eligibility for compensation, since what mattered was the effect of the new or newly discovered fact. Innocence continued to be presumed; the applicant instead had to demonstrate that it was the new or newly discovered fact that showed he or she did not commit the offence. The present case could therefore be distinguished from *Capeau v. Belgium* (no. 42914/98, ECHR 2005-I), in which the applicant had to establish his innocence more generally. In that case the Court stated that such a requirement, "without qualification or reservation, casts doubt on the applicant's innocence" (see *Capeau*, cited above, § 25). Section 133(1ZA) of the 1988 Act did not require applicants to prove their innocence "without qualification or reservation".

140. Furthermore, in *Allen* the Court had confirmed that there was nothing intrinsically objectionable about a Contracting State having a restricted criterion-based system, with a narrow concept of "miscarriage of justice" limiting the circumstances in which compensation would be payable. Such a system was inherent in Article 14(6) ICCPR, to which section 133 of the 1988 Act gave effect, and in Article 3 of Protocol No. 7 to the Convention. If the previous form of section 133 of the 1988 Act (which was considered by the Grand Chamber in *Allen*) did not infringe the presumption of innocence, there was no logical or coherent basis for suggesting that a negative conclusion on the amended test did so. As Lord Mance pointed out in the applicants' cases,

category 2 in *R(Adams)* subsumed all category 1 cases (see paragraph 33 above). There was no logical reason why an assessment of whether the new or newly discovered fact showed beyond reasonable doubt that a person could not possibly have been convicted could differ in principle for the purposes of Article 6 § 2 of the Convention from an assessment of whether the new or newly discovered fact showed beyond reasonable doubt that he did not commit the offence. If a refusal under the former did not amount to an imputation of guilt, a refusal under the latter could not do so.

141. Eligibility for compensation under section 133(1ZA) of the 1988 Act was not based on an individual demonstrating his innocence. The question as to what categories of person to include within the scope of compensation for a "miscarriage of justice" was prescribed by the domestic statutory scheme. The application of the statutory criteria, and an inability to satisfy the specific restrictive criteria, did not in any way impugn an applicant's continuing entitlement to be presumed innocent of the offence in question. It was simply a restrictive compensation scheme which was concerned with drawing a legitimate policy line as to who would be compensated out of the wider class of persons who had had convictions quashed on appeal. All such persons were presumed innocent, but it had always been legitimate and consistent with Article 6 § 2 for a State to restrict eligibility for compensation in such circumstances. It was simply wrong to suggest that there was a consequential connotation of guilt by the application of criteria restricting compensation. Logically, if that were the case, it would be a connotation that would have arisen in a similar way under the previous scheme in distinguishing between *R(Adams)* category 2 and category 3 cases (see paragraph 14 above). The Court had already confirmed that was not the case in *Allen* and the cases involving section 133 which followed it.

142. The Government therefore invited the Court to find no violation of Article 6 § 2 of the Convention on the facts of the two cases before it.

**(c) The third party intervenors**

*(i) JUSTICE*

143. JUSTICE drew the Court's attention to the approach adopted both in neighbouring jurisdictions and in other Contracting States. In Scotland section 133 of the 1988 Act continued to apply in its unamended form. In Ireland Article 14(6) ICCPR applied but a "miscarriage of justice" did not require proof of innocence. The position was therefore similar to that in Scotland (and that which had existed in the rest of the United Kingdom prior to the introduction of section 133(1ZA)).

144. As the Court had observed in *Allen*, in many other Contracting States compensation was automatic following a finding of "not guilty", the quashing of a conviction or the discontinuance of proceedings (see *Allen*, cited above, § 76). JUSTICE referred to four Contracting States (Austria, Belgium,

Norway and Spain) which formerly had statutory tests requiring an applicant to demonstrate innocence in order to receive compensation, and in which the tests were amended to remove that requirement. In Austria and Norway the law was amended following the Court's judgments in *Sekanina* and *Rushiti* (both cited above); in Belgium the law changed following the Court's judgment in *Capeau* (cited above); and in Spain the law was changed following the judgments of the Court in *Puig Panella v. Spain* (no. 1483/02, 25 April 2006), *Tendam v. Spain* (no. 25720/05, 13 July 2010) and *Vlieeland Boddy and Marcelo Lanni v. Spain* (nos. 53465/11 and 9634/12, 16 February 2016).

145. JUSTICE also emphasised the negative impact of wrongful conviction. It could ruin a person's life: he could lose his home, his job and his income, and it could place his relationships under immense strain. The public would think that he was guilty, a mark that would be hard to remove. Spending years in prison, knowing that he should not have been there, could cause serious psychological trauma. When released, reintegrating back into society could be yet another challenge and without proper support many exonerees struggled to come to terms with freedom. Compensation was not a panacea, but it could provide recognition of the harm caused, funds to establish a home and access to specialist treatment and support.

*(ii) The NIHRC*

146. The NIHRC addressed the application of the section 133 scheme in Northern Ireland. In Northern Ireland the payment of compensation for miscarriages of justice was a "transferred" matter, meaning that it fell within the remit of the Northern Ireland Assembly, and claims were dealt with by the Department of Justice in Northern Ireland. However, there was an exception for cases which dealt with "protected information", being information that it would be against the interest of national security to disclose. These cases remained within the discretion of the Secretary of State for Northern Ireland.

147. As in England and Wales, the definition of "miscarriage of justice" given by the Supreme Court in *R(Adams)* (see paragraph 14 above) applied to all applications for compensation in Northern Ireland prior to the 2014 amendment to the 1988 Act. However, the amended section 133(1ZA) applied only in respect of applications determined in England and Wales, and applications determined by the Secretary of State for Northern Ireland. The test under the former section 133 of the 1988 Act – and the definition of "miscarriage of justice" as identified by the Supreme Court in *R(Adams)* (see paragraph 14 above) – therefore continued to apply to determinations made by the Department of Justice in Northern Ireland.

148. If "protected information" was involved, the person whose conviction was quashed by the CACD might well have been excluded from the process that determined that his or her conviction was unsafe. He or she

would therefore find it next to impossible to explore the nature or existence of the new or newly discovered facts, and thus demonstrate eligibility for compensation.

149. Finally, the NIHRC pointed out that during the passage of the 2014 Act, the Ministry of Justice's Impact Assessment made it clear that the new, narrower definition of "miscarriage of justice" had the aim of lessening the burden of the compensation scheme on taxpayers by reducing unnecessary and expensive legal challenges to Government decisions. The Impact Assessment estimated the costs savings to be around GBP 100,000 annually.

### *2. The Court's assessment*

#### *(a)* The statement of general principles in *Allen*

150. In *Allen* the Grand Chamber described the approach taken in previous comparable cases as follows:

> "120. In the early case of *Minelli*, cited above, which concerned an order requiring the applicant to pay prosecution costs following discontinuation of the criminal proceedings, the Court set out the applicable principle as follows:
>
> '37. In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty. ...'
>
> 121. In the first cases with which it was confronted concerning applications by a former accused for compensation or for defence costs, the Court drew on the principle set out in *Minelli*, explaining that a decision whereby compensation for detention on remand and reimbursement of an accused's necessary costs and expenses were refused following termination of proceedings might raise an issue under Article 6 § 2 if supporting reasoning which could not be dissociated from the operative provisions amounted in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence (see *Englert*, cited above, § 37; *Nölkenbockhoff*, cited above, § 37; and *Lutz*, cited above, § 60). All three cases concerned prior criminal proceedings which had ended in discontinuation, rather than acquittal. In finding no violation of Article 6 § 2, the Court explained that the domestic courts had described a "state of suspicion" and that their decisions did not contain any finding of guilt.
>
> 122. In the subsequent *Sekanina* judgment, the Court drew a distinction between cases where the criminal proceedings had been discontinued and those where a final acquittal judgment had been handed down, clarifying that the voicing of suspicions regarding an accused's innocence was conceivable as long as the conclusion of criminal proceedings had not resulted in a decision on the merits of the accusation, but that it was no longer admissible to rely on such suspicions once an acquittal had become final (*Sekanina*, cited above, § 30). Thus the *Sekanina* principle appears to seek to limit the principle established in *Minelli* to cases where criminal proceedings have been discontinued. The case-law shows that in the latter cases, the *Minelli* principle has been consistently cited as the applicable general principle (see *Leutscher*, § 29; *Mulaj*

and *Sallahi*; *Baars*, §§ 26-27; the judgment in *Capeau*, § 22; *A.L. v. Germany*, § 31; *Panteleyenko*, § 67; and *Grabchuk*, § 42, all cited above). The distinction made in *Sekanina* between discontinuation and acquittal cases has been applied in most of the cases concerning acquittal judgments which followed *Sekanina* (see, for example, *Rushiti*, cited above, § 31; *Lamanna v. Austria*, no. 28923/95, § 38, 10 July 2001; Weixelbraun, cited above, § 25; *O. v. Norway*, cited above, § 39; *Hammern*, cited above, § 47; *Yassar Hussain*, cited above, §§ 19 and 23; *Tendam*, cited above, §§ 36-41; *Ashendon and Jones*, cited above, §§ 42 and 49; and *Lorenzetti*, cited above, §§ 44-47; but compare and contrast *Del Latte* and *Bok*, both cited above).

123. In cases involving civil compensation claims lodged by victims, regardless of whether the criminal proceedings ended in discontinuation or acquittal, the Court has emphasised that while exoneration from criminal liability ought to be respected in the civil compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. However, if the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention (see *Ringvold*, cited above, § 38; *Y v. Norway*, cited above §§ 41-42; *Orr*, cited above, §§ 49 and 51; and *Diacenco*, cited above, §§ 59-60). This approach has also been followed in cases concerning civil claims lodged by acquitted applicants against insurers (see *Lundkvist and Reeves*, both cited above).

124. In cases concerning disciplinary proceedings, the Court accepted that there was no automatic infringement of Article 6 § 2 where an applicant was found guilty of a disciplinary offence arising out of the same facts as a previous criminal charge which had not resulted in a conviction. It emphasised that the disciplinary bodies were empowered to, and capable of, establishing independently the facts of the cases before them and that the constitutive elements of the criminal and disciplinary offences were not identical (see *Vanjak*, cited above, §§ 69-72, and *Šikić*, cited above, §§ 54-56).

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 its reasoning with Article 6 § 2 (see, for example, *Y v. Norway*, cited above, §§ 43-46; *O. v. Norway*, cited above, §§ 39-40; *Hammern,* cited above, §§ 47-48; *Baars*, cited above, §§ 29-31; *Reeves*, cited above; *Panteleyenko*, cited above, § 70; *Grabchuk*, cited above, § 45; and *Konstas v. Greece*, no. 53466/07, § 34, 24 May 2011). Thus, in a case where the domestic court held that it was 'clearly probable' that the applicant had 'committed the offences ... with which he was charged', the Court found that it had overstepped the bounds of the civil forum and had thereby cast doubt on the correctness of the acquittal (see *Y v. Norway*, cited above, § 46; see also *Orr*, cited above, § 51; and *Diacenco*, cited above, § 64). Similarly, where the domestic court indicated that the criminal file contained enough evidence to establish that a criminal offence had been committed, the language used was found to have violated the presumption of innocence (see *Panteleyenko*, cited above, § 70). In cases where the Court's judgment expressly referred to the failure to dispel the suspicion of criminal guilt, a violation of Article 6 § 2 was established (see, for example, *Sekanina*, cited above, §§ 29-30, and *Rushiti*, cited above, §§ 30-31). However, when regard is had to the nature and context

of the particular proceedings, even the use of some unfortunate language may not be decisive (see paragraph 125 above). The Court's case-law provides some examples of instances where no violation of Article 6 § 2 has been found even though the language used by domestic authorities and courts was criticised (see *Reeves*, cited above, and *A.L. v. Germany*, cited above, §§ 38-39)."

**(b) Application of those general principles in the cases following *Allen***

151. The Court has, for the most part, followed the approach set out in *Allen* itself in relation to the three different strands of its second aspect case-law discussed at paragraphs 120-124 of that judgment: (1) costs issues and claims for compensation by former accused, in which a distinction had been drawn between (a) proceedings which followed an acquittal and (b) those which followed a discontinuance (see *Allen*, §§ 120 and 122); (2) cases involving civil compensation claims lodged by victims (*ibid*. § 123); and (3) cases concerning disciplinary proceedings (*ibid*. § 124).

152. When examining the reasoning in disciplinary proceedings ending in the dismissal of an employee who had been acquitted of criminal charges originating in the same facts or where the criminal proceedings had been discontinued, the defining criterion for the Court has continued to be the approach summarised in *Allen* (cited above, § 124); that is, whether the impugned reasoning amounted to an imputation of criminal guilt (see *Istrate v. Romania*; no. 44546/13, 13 April 2021, concerning a discontinuance, and *Güç v. Turkey*, no. 15374/11, 23 January 2018 and *Alkaşı v. Turkey*, no. 21107/07, 18 October 2016, concerning acquittals).

153. Likewise, as regards cases involving civil compensation claims lodged by victims, the Court's position continues to be that, regardless of whether the criminal proceedings ended in a discontinuance or an acquittal, exoneration from criminal liability ought to be respected in the civil compensation proceedings, but should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof, provided that the national decision on compensation does not contain a statement imputing criminal liability to the respondent party. In such cases the applicants have generally complained about specific wording in a decision that raised doubts as to their innocence. While this does not mirror precisely the applicants' complaints in the present case, the following rulings are nevertheless noteworthy.

(i) In *Pasquini (No. 2)* (cited above) and *Farzaliyev* (cited above) the Court considered the imposition of civil liability to pay compensation after criminal proceedings were discontinued as time-barred. In both cases the impugned reasoning was found to be incompatible with Article 6 § 2 of the Convention. In *Pasquini (No. 2)* (cited above) that was because the competent court had established unequivocally that the applicant's actions had amounted to the criminal acts of which he had been charged and that he had committed those acts with deliberate intent, whereas in *Farzaliyev* (cited above) it was

because the reasoning reflected an opinion that a criminal offence had been committed and that the applicant was guilty of that offence.

(ii) In contrast, in *Fleischner* (cited above), in which the Court considered civil liability to pay compensation after criminal proceedings had been discontinued, no violation of Article 6 § 2 of the Convention was found as the language used by the domestic courts could not reasonably have been read as imputing criminal liability to the applicant. Although certain aspects of the conditions for civil liability overlapped with those establishing criminal liability, the civil courts had to determine the compensation claim on the basis of tort law in a different legal framework from that of the criminal proceedings.

(iii) In *N.A. v. Norway* (cited above), *Ilias Papageorgiou* (cited above), *Marinoni v. Italy* (no. 27801/12, 18 November 2021), and *Benghezal v. France* (no. 48045/15, 24 March 2022) the Court considered the imposition of civil liability to pay compensation to the victim following an acquittal of criminal charges arising in relation to the same facts. In these cases it found that the reasoning on compensation did not involve the imputation of criminal guilt and that there was no breach of Article 6 § 2. On the other hand, in *Cleve v. Germany* (no. 48144/09, 15 January 2015), the Court held that the reasoning of the Regional Court had amounted to a finding that the applicant was guilty of the offences with which he was charged.

154. It is likewise of interest that the termination of proceedings by way of an acquittal has not been found to preclude as such the confiscation of funds which were illicit as a result of the crimes attributed not to the acquitted person, but to a third party (see *Balsamo v. San Marino*, nos. 20319/17 and 21414/17, 8 October 2019); or the imposition of an obligation to pay administrative fines (see *Kapetanios*, cited above, where a violation was, however, found on the facts of the case as the administrative courts in rejecting the applicants' appeal against the fines considered that they had committed the offences of which they had previously been acquitted).

155. Turning, then, to the post-*Allen* cases relating to costs issues and claims for compensation by a former accused following the *discontinuance* of criminal proceedings (cases falling within the second limb of the first strand referred to above), the Court has, in keeping with the *Minelli*, *Englert* and *Nölkenbockhoff* line of case-law (all cited above), attached decisive importance to whether the impugned decision on the claim involved an affirmation of criminal guilt (see *Rigolio v. Italy*, no. 20148/09, 9 March 2023, where the applicant's criminal prosecution was discontinued as time-barred and in the civil compensation proceedings brought against him by the victim (in that case, the Municipality of Besozzo) he was ordered to bear legal costs for reasons which, when seen in context, did not suggest that he had actually committed the offence).

156. However, cases relating to costs issues and claims for compensation by a former accused following an *acquittal* (cases falling within the first limb

of the first strand) are somewhat more problematic. The present case offers an opportunity for the Court to revisit that branch of its case-law.

**(c) The approach to be taken in cases concerning the second aspect of Article 6 § 2**

157. In *Sekanina* (cited above) the Court, in the context of a claim by a former accused for costs and compensation following an acquittal (a case falling under the first limb of the first strand), held that the voicing of suspicions regarding an accused's innocence was conceivable as long as the conclusion of criminal proceedings had not resulted in a decision on the merits of the accusation, but it was no longer admissible to rely on such suspicions once an acquittal had become final (see *Sekanina*, cited above, § 30). However, in the present case the Grand Chamber considers it necessary to re-evaluate whether maintaining this distinction – and thereby affording a higher level of protection under the second aspect of Article 6 § 2 of the Convention to a person who has been acquitted than to a person against whom criminal proceedings have been discontinued – continues to be justified.

158. While at first glance a discontinuance might not appear to have the same exonerating effect as an acquittal, on closer inspection the reality is far more nuanced and less clear cut. Criminal proceedings might be discontinued because there is simply not enough evidence to prosecute (see, for example, *McCann and Healy*, cited above). On the other hand, persons against whom there was ample evidence to prosecute (and maybe even to convict) might have proceedings discontinued or be acquitted on a technicality (for example, where the prosecution was statute-barred). There would appear to be no good reason why the latter should be in a more favourable position, simply because their cases ended in an acquittal.

159. Moreover, the significance of a discontinuance may vary between individual cases and also between different legal systems. In the case of *Lähteenmäki v. Estonia* (no. 53172/10, § 49, 21 June 2016) the Court had regard to the specific context of the discontinuance of criminal proceedings pursuant to Article 202 of the Code of Criminal Procedure, which required an offence to have been committed for which the accused's guilt was negligible. While discontinuance under that provision did not amount to a conviction or an acquittal, the Court observed that it nevertheless had some inculpatory effect. Similarly, in San Marino proceedings could not be discontinued as time-barred if the judge was satisfied that the defendant did not commit the offence (see *Pasquini (No. 2)*, cited above, § 24). Furthermore, in both Romania and Estonia the accused's consent (and therefore his or her waiver of an assessment on the merits) was necessary (see *Caraian v. Romania*, no. 34456/07, §§ 42 and 76, 23 June 2015 and *Lähteenmäki*, cited above, §§ 19 and 47-48). On the other hand, in some countries, such as the United Kingdom, the Prosecution might discontinue proceedings if there was insufficient evidence to pursue criminal charges (see paragraph 34 above).

When this happens the defendant will not have had the opportunity to be acquitted, since the evidence against him was too weak to bring the case to trial in the first place, and yet the principle developed in *Sekanina* (cited above, § 30) would suggest that if he were to make a claim against the State for compensation, the presumption of innocence would apply less rigorously than it would have done if there had been sufficient evidence to go to trial, but the trial ended in an acquittal.

160. It is noteworthy that in *Allen* (which, like *Sekanina*, also concerned a compensation claim against the State by a former accused) the Grand Chamber did not deem it appropriate to uphold the clear distinction between discontinuance and acquittal as laid down in the *Sekanina* judgment. In this respect it relied on the following considerations:

> "127. It is relevant to the overall context of the present case that the applicant's conviction was quashed by the CACD on the ground that it was 'unsafe' because new evidence might have affected the jury's decision had it been available at trial (see paragraph 20 above). The CACD did not itself assess all the evidence, in the light of the new evidence, in order to decide whether guilt had been established beyond reasonable doubt. No retrial was ordered as the applicant had already served her sentence of imprisonment by the time her conviction was quashed (see paragraphs 21, 26 and 34 above). Pursuant to section 2(3) of the Criminal Appeal Act 1968, the quashing of the applicant's conviction resulted in a verdict of acquittal being entered (see paragraph 45 above). However, the applicant's acquittal was not, in the Court's view, an acquittal 'on the merits' in a true sense (compare and contrast *Sekanina* and *Rushiti*, both cited above, where the acquittal was based on the principle that any reasonable doubt should be considered in favour of the accused). In this sense, although formally an acquittal, the termination of the criminal proceedings against the applicant might be considered to share more of the features present in cases where criminal proceedings have been discontinued (see, for example, *Englert*, *Nölkenbockhoff*, *Lutz*, and *Mulaj and Sallahi*, all cited above; *Roatis v. Austria* (dec.), no. 61903/00, 27 June 2002; and *Fellner v. Austria* (dec.), no. 64077/00, 10 October 2002)."

161. Having stated that the acquittal of the applicant in *Allen* shared more of the features present in cases where criminal proceedings had been discontinued, the Grand Chamber found no violation of Article 6 § 2 of the Convention in its second aspect since the language used by the domestic courts, when considered in the context of the exercise which they were required to undertake under domestic law, could not be said to have undermined the applicant's acquittal or to have treated her in a manner inconsistent with her innocence (see *Allen*, cited above, § 134). In other words, basing itself in substance on the criteria applying to a discontinuance, as identified in *Minelli* and subsequently relied on in the *Englert*, *Nölkenbockhoff* and *Lutz* line of case-law (the latter having been referred to expressly in the key passage in paragraph 127 of *Allen*), the Court found that the impugned reasoning did not reflect an opinion that the applicant was guilty of the criminal offences in respect of which her conviction had been quashed. Although it did not signal an express departure from the existing case-law, the *Allen* ruling nevertheless entailed a significant qualification

regarding the kind of circumstances in which the Court would be prepared to accord the heightened level of protection of the presumption of innocence that an acquitted person may be able to derive from the second aspect of Article 6 § 2 of the Convention. Consistently with the aforementioned approach, three similar applications against the United Kingdom were declared inadmissible (see *K.F. v. the United Kingdom*, *Adams*, and *A.L.F. v. the United Kingdom*, all cited above and summarised at paragraphs 17-20 above).

162. In reality, many cases are likely to fall into this grey area. As Lord Mance pointed out (see paragraph 34 above),

> "what then would be the position if a criminal judge or court were (as can happen) to acquit a defendant on the basis that the prosecution had not established its case to the requisite criminal standard and/or that the defendant was entitled to the benefit of the doubt? Why should such an outcome at first instance be treated any differently from the outcome before the CACD on appeal in *Allen*? And, if the two situations are alike, then the potential applicability of *Sekanina* must, in the light of *Allen*, be understood as severely limited in scope."

163. Moreover, whilst the distinction between a discontinuance and a final acquittal on the merits has been found to exist in cases concerning costs issues and claims for compensation by former accused (cases falling under the first strand of the Court's case-law) (see paragraph 151 above), no such distinction has been applied with respect either to cases involving civil compensation claims lodged by victims and cases concerning disciplinary proceedings (the second and third strands, respectively) (see paragraph 151 above) or to any other second aspect cases which do not fall neatly into any of the three strands referred to above (see paragraphs 105 and 107 above). Indeed, in relation to cases involving civil compensation claims lodged by victims (the second strand), the Court has expressly affirmed that regardless of whether the criminal proceedings ended in discontinuance or acquittal, exoneration from criminal liability should not preclude the establishment of civil liability to pay compensation to the victim arising out of the same facts on the basis of a less strict burden of proof. If that were not the case Article 6 § 2 would give a criminal acquittal the undesirable effect of pre-empting the victim's possibilities of claiming compensation under the civil law of tort, entailing an arbitrary and disproportionate limitation on his or her right of access to a court under Article 6 § 1 of the Convention (see *Fleischner*, cited above, § 61). This again could give a person who was acquitted of a criminal offence, but who might be considered liable according to the civil burden of proof, the undue advantage of avoiding any responsibility for his or her actions (see *N.A. v. Norway*, cited above, § 40). Similar considerations apply to cases concerning disciplinary proceedings (the third strand) (see, for example, the cases referred to in paragraph 152 above).

164. The Court is not convinced that a higher level of protection of the presumption of innocence ought to be maintained in cases concerning claims by former accused for costs and compensation following an acquittal (cases falling under the first limb of the first strand) than in cases falling outside this narrow category. As a general rule, cases concerning claims by former accused for costs and compensation concern damage engaging the responsibility of the State, while the remaining strands concern the obligations of the acquitted person vis-à-vis the community, be it a private person or entity or the authorities. In this respect, it should be underlined that Article 6 § 2 does not guarantee a person charged with a criminal offence a right to compensation for lawful detention on remand or for costs where proceedings are subsequently discontinued or end in an acquittal. Equally, that provision does not guarantee a person acquitted of a criminal offence a right to compensation for a miscarriage of justice of whatever kind (see *Allen*, cited above, § 82).

165. From a legal perspective it is therefore difficult to justify relying on the distinction between acquittals and discontinuances in one category of case but not in others. There are obviously important policy reasons for not allowing an acquittal to preclude, for example, an award of damages to a victim, or the protection of an at-risk child. However, there is no obvious legal reason for according a heightened protection to a small subset of second aspect cases. Doing so could even lead to incongruous outcomes of post-acquittal proceedings brought, on the one hand, by the victim claiming civil compensation from the acquitted person and, on the other hand, by the acquitted person against the State on account of damages from the prosecution or defence costs.

166. The Court acknowledges that the exonerating effect of an acquittal is reflected in the Convention itself. Whilst a final acquittal means that the accused cannot be charged, tried and convicted again for the same offence (see Article 4 of Protocol No. 7; for more details regarding the meaning of "final" see §§ 22 and 29 of the explanatory report), discontinuance does not necessarily prevent re-instigation of the proceedings (see *Capeau*, cited above, § 25; see also *McCann and Healy*, cited above, § 110). Moreover, it would appear that a number of Contracting States have modified their compensation schemes in order to comply with the *Sekanina* line of case-law (see paragraph 79 above). However, in light of the considerations outlined in the foregoing paragraphs, the Court is no longer convinced that decisions taken by the competent authorities on a claim for compensation or for defence costs by a former accused following an acquittal have such distinctive features as to warrant a higher level of protection of the presumption of innocence under Article 6 § 2 of the Convention than that which applies to a person in respect of whom the criminal proceedings have been discontinued.

167. Accordingly, the Court considers that it is no longer necessary or desirable to maintain that distinction.

168. Consequently, henceforth, regardless of the nature of the subsequent linked proceedings, and regardless of whether the criminal proceedings ended in an acquittal or a discontinuance, the decisions and reasoning of the domestic courts or other authorities in those subsequent linked proceedings, when considered as a whole, and in the context of the exercise which they are required by domestic law to undertake, will violate Article 6 § 2 of the Convention in its second aspect if they amounted to the imputation of criminal liability to the applicant. To impute criminal liability to a person is to reflect an opinion that he or she is guilty to the criminal standard of the commission of a criminal offence (see, *mutatis mutandis*, *Minelli*, cited above, § 37 and *Bikas*, cited above, § 44), thereby suggesting that the criminal proceedings should have been determined differently.

169. This approach reflects the fact that at national level judges may be required, outside the context of a criminal charge, to sit in cases arising out of the same facts as a previous criminal charge which did not result in a conviction. The protection afforded by Article 6 § 2 in its second aspect should not be interpreted in such a way as to preclude national courts in subsequent proceedings – in which they are exercising a different function to that of the criminal judge, in accordance with the relevant provisions of domestic law – from engaging with the same facts as were decided in the previous criminal proceedings, provided that in doing so they do not impute criminal liability to the person concerned. A person who was acquitted or in respect of whom criminal proceedings were discontinued will remain subject to the ordinary application of domestic rules as to evidence and the standard of proof outside criminal trials.

**(d) The application of those principles to the cases at hand**

170. In the present case the applicants contend that the test in section 133(1ZA) of the 1988 Act is itself incompatible with Article 6 § 2 of the Convention. They do not complain about the language used by the Justice Secretary or the domestic courts, nor do they point to any specific language in the domestic decisions that might raise an issue under the second aspect of Article 6 § 2. The focus of their complaint is therefore the exercise that the Justice Secretary was required by domestic law to undertake – namely, the determination, in the context of a confidential civil and administrative procedure, of whether the applicants were eligible for compensation for a miscarriage of justice because the new or newly discovered facts responsible for the quashing of their convictions demonstrated beyond reasonable doubt that they did not commit the offences.

171. In contrast to its first aspect, in which the presumption of innocence acts as a procedural guarantee, in its second aspect its role is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they were in fact guilty of the

offence charged (see paragraph 108 above; see also *Allen*, cited above, § 94). Consequently, in a case such as the present there will only have been a violation of Article 6 § 2 of the Convention if the refusal of compensation by reference to the aforementioned test itself imputed criminal liability to the applicants.

172. Before turning to this question, it is important to reiterate that Article 6 § 2 of the Convention does not guarantee a person whose criminal conviction has been quashed a right to compensation for a miscarriage of justice (see *Allen*, cited above, § 82, with references therein; see also paragraph 164 above). Article 3 of Protocol No. 7 to the Convention provides a right to compensation where certain conditions are satisfied, but, as the Explanatory Report to Protocol No. 7 explained, it is not intended to give a right of compensation where those preconditions are not satisfied (see paragraphs 90 and 93 above). In any event, the United Kingdom has neither signed nor acceded to Protocol No. 7 (see paragraph 91 above). While Article 3 of Protocol No. 7 does not constitute a form of *lex specialis* excluding the application of Article 6 § 2 of the Convention to claims for compensation for a miscarriage of justice (see *Allen*, cited above, § 105), it goes without saying that the latter cannot be interpreted so as to create a right to such compensation against Contracting States, like the United Kingdom, that have not ratified Protocol No. 7. Furthermore, in a case under Article 6 § 2 of the Convention, it is not for the Court to define "miscarriage of justice" when Article 3 of Protocol 7 does not do so. As the Explanatory Report to Protocol No. 7 explained (see paragraph 93 above), where the preconditions in that Article were satisfied, compensation was to be paid "according to the law or the practice of the State concerned". The respondent State was therefore free to decide how "miscarriage of justice" should be defined for these purposes, and to thereby draw a legitimate policy line as to who out of the wider class of people who had had their convictions quashed on appeal should be eligible for compensation (see paragraph 141 above), so long as the policy line was not drawn in such a way that the refusal of compensation in and of itself imputed criminal guilt to an unsuccessful applicant.

173. In *Allen* the Court was only called upon to consider the reasoning employed by the domestic courts and authorities, and not the statutory test (see *Allen*, cited above, § 78). It nevertheless noted that what was "important above all" was 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".

174. In *R(Adams)* the Supreme Court clarified the definition of "miscarriage of justice", with the majority finding that it included not only cases where the fresh evidence showed clearly that the defendant was innocent of the crime of which he had been convicted (category (1)), but also where the fresh evidence so undermined the evidence against the defendant

that no conviction could possibly be based upon it (category (2); see paragraph 14 above). As Lord Reed pointed out in the present case (in paragraph 161 of the Supreme Court's judgment), the "dicta of Lord Steyn in the case of *Mullen*, that the phrase 'miscarriage of justice' in section 133 of the 1988 Act was restricted to cases where the defendant was demonstrably innocent of the crimes of which he had been convicted ... was subsequently disapproved by the majority of this court in *[R]Adams*."

175. When examining subsequently the application lodged by Mr Adams alleging a violation of Article 6 § 2 of the Convention (*Adams v. the United Kingdom* and also the application lodged by A.L.F, both cited above), the Court addressed directly the compatibility of the statutory test as interpreted by the Supreme Court in *R(Adams).* It held that there was nothing in the section 133 criteria which called into question the innocence of an acquitted person and the legislation itself did not require any assessment of the applicant's criminal guilt (see paragraph 18 above). Therefore, section 133 as it then was could not be regarded as incompatible with Article 6 § 2 (*Adams*, cited above, § 39 and *A.L.F. v. the United Kingdom*, cited above, § 22). Furthermore, it noted that, as explained by Lord Phillips, the test for a miscarriage of justice would be satisfied where a new fact so undermined the evidence against the defendant that no conviction could possibly be based upon it and that test had been broadly approved by the other four Justices in the majority (see paragraph 66 above). The application of the test did not undermine the applicants' acquittal or treat them in a manner inconsistent with their innocence. It did not oblige the domestic courts to comment on whether, on the basis of the evidence as it stood at the appeal, the applicants should have been acquitted or convicted, nor did it require the courts to comment on whether the evidence was indicative of their guilt or innocence (see paragraph 18 above).

176. In reaching this conclusion, the Court observed that in the course of the Supreme Court judgment in *R(Adams)* there had been some reference to the question of innocence. While for the Court it was "unfortunate" that some of the language used in the Supreme Court judgment was liable to create confusion and an undesirable impression in the mind of the applicant as to the standard required for compensation, in light of the clear test articulated by Lord Phillips, it considered it to be apparent to any future claimant that questions of guilt and innocence were irrelevant to proceedings brought under section 133 of the 1988 Act (see paragraph 19 above). Similarly, in *A.L.F. v. the United Kingdom* the Court considered a reference to "innocence" in the refusal letter to have been "both unfortunate and unnecessary", and indicated that "in order to avoid both any possible misconceptions in the minds of future claimants under section 133 and any suggestion of bringing into play the presumption of innocence under Article 6 § 2 of the Convention, it would be more prudent to avoid such language altogether in future decisions made under this section" (see paragraph 20 above).

177. Under the new section 133(1ZA) of the 1988 Act it falls to the Justice Secretary to decide whether the new or newly discovered fact, which resulted in the quashing of the conviction, showed beyond reasonable doubt that the person did not commit the offence (see paragraph 80 above). The original wording for the amended section 133(1ZA) required the new or newly discovered fact to show beyond reasonable doubt that the person "was innocent of the offence" but this was changed during the legislative process to "did not commit the offence" due to concerns about the potential breach of Article 6 § 2 of the Convention following the Court's judgment in *Allen* and also the Chamber decisions in *Adams*, *A.L.F. v. the United Kingdom* and *K.F. v. the United Kingdom* (all cited above) (see paragraph 21 above).

178. According to the approach identified in paragraph 168 above, the question for the Court to answer in the present case is whether the refusal of compensation imputed criminal liability to the applicants.

179. First of all, while the test in section 133(1ZA) would appear to be comparable to the category 1 test as identified in *R(Adams)* (see paragraph 14 above), the word "innocent", which is found in the category 1 test in the categorisation formulated by the Court of Appeal and adopted by the majority of the Supreme Court in that case, has now been replaced with "did not commit the offence" (see paragraph 21 above). This change might not have significantly altered the meaning of section 133(1ZA), but it nevertheless avoids the use of the word "innocent", which troubled the Court in *Allen*, *Adams* and *A.L.F. v. the United Kingdom* (see paragraphs 19, 20 and 176 above).

180. Furthermore, and more importantly, the test in section 133(1ZA) of the 1988 Act required the Justice Secretary to comment not on the basis of the evidence as it stood at the appeal whether the applicant should be, or would likely be, acquitted or convicted or on whether the evidence was indicative of the applicant's guilt or innocence (see *Adams*, cited above, § 40) but only on whether the new or newly discovered fact showed beyond reasonable doubt that the applicant did not commit the offence in question. Therefore, it could not be said that the refusal of compensation by the Justice Secretary imputed criminal guilt to the applicant by reflecting the opinion that he or she was guilty to the criminal standard of committing the criminal offence, thereby suggesting that the criminal proceedings should have been determined differently. To find in the negative that it could not be shown to the very high standard of proof of beyond reasonable doubt that an applicant did not commit an offence – by reference to a new or newly discovered fact or otherwise – is not tantamount to a positive finding that he or she did commit the offence.

181. In this connection it should be emphasised that in its second aspect Article 6 § 2 of the Convention protects innocence in the eyes of the law (see *Allen*, cited above, § 103) and not a presumption of factual innocence as suggested by the applicants (see paragraphs 131-132 above). The

Justice Secretary is not required by section 133(1ZA) to comment on an applicant's innocence in the eyes of the law, and the refusal of an application for compensation under that section is not inconsistent with his or her continuing innocence in this legal sense.

182. The foregoing considerations are sufficient to enable the Court to conclude that the refusal of the applicants' claims for compensation under section 133(1ZA) of the 1988 Act, in the context of a confidential civil and administrative procedure, did not breach the presumption of innocence in its second aspect. In reaching this conclusion, the Court is not insensible to the potentially devastating impact of a wrongful conviction. However, its role is not to determine how States should translate into material terms the moral obligation they may owe to persons who have been wrongfully convicted; rather, in the present case it was tasked solely with determining on the facts before it whether there had been a breach of Article 6 § 2 of the Convention due to the operation of a compensations scheme established domestically which was clearly conceived and operated in restrictive terms. In light of the foregoing considerations, it holds that this was not the case.

183. There has accordingly been no violation of Article 6 § 2 of the Convention.

## FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the applications admissible;

3. *Holds*, by twelve votes to five, that there has been no violation of Article 6 § 2 of the Convention.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 June 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Søren Prebensen | Síofra O'Leary |
| Deputy to the Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Ravarani, Bošnjak, Chanturia, Felici and Yüksel is annexed to this judgment.

S.O.L.
S.C.P.

# JOINT DISSENTING OPINION OF JUDGES RAVARANI, BOŠNJAK, CHANTURIA, FELICI AND YÜKSEL

It is with regret that we were unable to vote with the majority in finding that there has been no violation of Article 6 § 2 of the Convention. Although we agree with the majority that Article 6 § 2 of the Convention is applicable to the facts of the case, we are of the opinion that, through their decisions, the competent administrative and judicial authorities of the United Kingdom violated the presumption of the applicants' innocence.

**1.** ***The underlying facts.*** Mr Nealon was convicted of attempted rape in 1997, primarily on the basis of identification evidence, and was sentenced to life imprisonment with a minimum term of seven years. The discovery of DNA traces from an unknown male on the underwear worn by the victim on the night of the attack prompted the competent court to quash his conviction in 2012. While it found that the prosecution's case had not been "demolished" by the fresh evidence, the court considered that its effect on the safety of the conviction was "substantial". The Crown Prosecution Service did not seek a retrial because, *inter alia*, the length of time of a retrial "was not in the public interest" and Mr Nealon had already spent 17 years in prison.

Mr Hallam was convicted of murder in 2004. The case against him had depended on the visual identification evidence of two witnesses. New evidence cast doubt on the identification evidence which, in the view of the competent court, undermined the safety of his conviction. However, the domestic court "was not satisfied that it would be appropriate to use [its power to declare him innocent] on the facts of [the said] case."

Following the quashing of their respective convictions, both former prisoners applied for compensation for a miscarriage of justice. It was refused in both cases, since the Secretary of State for Justice ("the Justice Secretary") was not satisfied that their convictions had been quashed on the ground that a new or newly discovered fact showed beyond reasonable doubt that they did not commit the offences.

**2.** ***The legal provision at stake.*** The legal provisions on which the Justice Secretary relied in issuing the relevant decisions, which were ultimately upheld by the Supreme Court, are section 133 of the Criminal Justice Act 1988 ("the 1988 Act"), providing for the payment of compensation where a person's conviction of a criminal offence was reversed on the ground that a new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice; and section 133(1ZA), enacted in 2014, pursuant to which there has been a miscarriage of justice if, and only if, the new or newly discovered fact shows that the person did not commit the offence.

It is noteworthy that during the legislative drafting process concerns were raised about a potential breach of Article 6 § 2 of the Convention. In the light

of those concerns, the term "innocent of the offence" was replaced by the phrase "did not commit the offence".

**3. *The Supreme Court's judgment.*** Both applicants sought judicial review of the Justice Secretary's refusal. Their claims were rejected by the Administrative Court and subsequently by the Court of Appeal. When the cases came before the Supreme Court, there was extensive discussion among the judges as to whether Article 6 § 2 applied to all decisions on, and the criteria for, an award of compensation under section 133 of the 1988 Act, especially the "second aspect" of Article 6 § 2, which prohibits the imputation of criminal guilt to a person who has been definitively acquitted in criminal proceedings (see also below). We note that, in his judgment, Lord Wilson, joined by several colleagues, underlined that "if Article 6 § 2 [has] the meaning ascribed to it by the [Strasbourg] Court, section 133 of the 1988 Act [is] not compatible with it." His recommendation was the meaning ascribed to Article 6 § 2 by the Court ought not to be adopted, which, *a contrario*, implies that if that meaning *is* adopted, then section 133(1ZA) *per se* violates the second aspect of Article 6 § 2.

There was a majority in the Supreme Court in favour of finding Article 6 § 2 applicable but not incompatible with section 133 (1ZA), the main reason being that the case did not involve the pursuit of any criminal charge, but instead a civil issue, elements of which had also featured in past criminal proceedings but which nonetheless obeyed different rules, especially as far as the standard of proof was concerned (namely, the balancing of probabilities in contrast to proof beyond any reasonable doubt).

Lord Reed and Lord Kerr dissented. They viewed the distinction between a requirement that innocence be established, and a requirement that innocence be established by a new or newly discovered fact and nothing else, as unrealistic, echoing the Court of Appeal's judgment of 15 July 2008 in the case of *Allen*: "If Article 6(2) were to apply ... there would be no reason in logic or fairness to distinguish between those whose convictions are quashed on grounds of fresh evidence and those whose convictions are quashed on other grounds; each would be in a position of being able to rely on the presumption of innocence" (judgment quoted in *Allen v. the United Kingdom* [GC], no. 25424/09, § 41, ECHR 2013). They insisted that the significance of a new piece of evidence can only be assessed in the context of the evidence as a whole. They consequently considered that "there is no material difference ... between asking whether the applicant's innocence has been established by the new or newly discovered fact and asking whether his innocence has been established."

In finding Article 6 § 2 applicable and yet section 133(1ZA) not incompatible with it, the majority of the Grand Chamber succeed in squaring the circle, an achievement which the judges in both the majority and the minority of the Supreme Court did not deem possible.

In line with the minority judges of the Supreme Court and for the reasons set out below, we consider that Article 6 § 2 is applicable, and that section 133(1ZA), *per se* as well as applied to the cases at hand, violates the presumption of innocence protected by this Convention provision.

**4.** ***The two aspects of the presumption of innocence.*** The presumption of innocence is a legal presumption. Like any legal presumption, it assists the decision-maker in a situation when a relevant fact is not known or cannot be known. Legal presumptions can be rebutted in relevant legal proceedings in an orderly manner. For the presumption of innocence, this means that it may be rebutted in criminal proceedings by proving that the accused committed the crime and that he or she is criminally liable for this fact. This is sometimes called the "first aspect" of the presumption of innocence protected by Article 6 § 2.

Should the presumption of innocence ultimately fail to be rebutted, it turns into "*praesumptio iuris et de iure*", meaning that the (former) accused is considered not to have committed the crime and not to be criminally liable. The constituent elements of the crime can no longer be discussed and called into question in any legal proceedings concerning this person. This is the "second aspect" of the presumption of innocence.

**5.** ***Section 133(1ZA)*** **per se** ***violates the presumption of innocence as enshrined in Article 6 § 2 of the Convention.*** In order for a person to receive compensation, section 133 (1ZA) of the 1988 Act requires that the new or newly discovered fact shows beyond reasonable doubt that he or she did not commit the offence. This provision is incompatible with the presumption of innocence as, on the one hand, it allows and even requires reassessment of whether the applicants committed the *criminal* offence, at a point when their conviction has been quashed and the presumption of innocence restored with final effect; and, on the other hand, it designs the decision-making process in such a way that the starting point is the presumption that the applicants committed the *criminal* offence, a presumption which can only be rebutted if they show beyond reasonable doubt that they did not commit it. This is a classic shifting of the burden of proof, which is in itself incompatible with the presumption of innocence.

The very "exercise" required by section 133(1ZA) involves establishing whether the applicants are "innocent" for the purposes of the said provision. It therefore required the applicants to prove their innocence in relation to the criminal law positively, by way of a new fact. In essence, they were not regarded as innocent from the outset. Thus, the issue at hand is whether the statutory test placed the burden on the applicants to prove their innocence again, thereby denying them the presumption of innocence. Unlike the majority, we consider that the matter goes beyond the mere wording of the decision casting doubt on the person's innocence.

**6.** ***The argument regarding the civil nature of compensation proceedings.*** The heavy reliance by the majority (and by the Supreme Court)

on the fact that the requirements in compensation proceedings are different from those applicable in criminal proceedings (see paragraph 178 of the present judgment) and that a balance of probabilities is sufficient for the finding as to whether the person did or did not commit the offence is seriously questionable, since rebuttal of the presumption of guilt is only possible by overcoming the hurdle "beyond reasonable doubt", which is an extremely high standard, and in principle applicable only to prosecution in criminal law. Whatever the distinctions between the two standards of proof put forward, the requirement of proof "beyond reasonable doubt" that the offence has not been committed flows directly from the wording of section 133(1ZA).

**7.** ***Can the language used "save" the presumption of innocence?*** It should be recalled that in *Allen*, the Grand Chamber stated that there was no single uniform approach but that ascertaining a violation in such circumstances depended on "the nature and context of the proceedings in which the impugned decision was adopted" and that the language used was "of critical importance", although not decisive (see *Allen*, §§ 125-126). The language/wording of the decisions and reasoning in the present case is not as central as it was in *Allen*, and therefore *Allen* has limited applicability in this respect. The applicant in *Allen* did not question the compatibility of section 133 with Article 6 § 2, but rather complained that the reasons given by the High Court and the Court of Appeal cast doubt on her innocence. In that instance, the Court examined the wording used. In the present case, however, the applicants alleged that, given the nature of the test (which concerns the burden of proof more than the wording in the Justice Secretary's decision), section 133 is inherently incompatible with Article 6 § 2. It is true that the refusal letters sent to the applicants by the Justice Secretary included statements to the effect that nothing in them was intended to undermine, qualify or cast doubt upon the decision to quash their convictions, and that they were presumed to be and remained innocent of the charges against them. However, the Court has previously established that it should not matter that the decision letters indicated that the denial of compensation did not cast doubt on an applicant's innocence, since what actually mattered was the substantive test applied (see *Hammern v. Norway*, no. 30287/96, § 48, 11 February 2003).

Thus, it is not true that simply making cautionary remarks is enough to avoid a violation of Article 6 § 2. As Lord Reed has put it, "the application of a test which in substance infringes the presumption of innocence is not rendered acceptable by the addition of words intended to avoid conflict with Article 6(2)" (see paragraph 45 of the present judgment).

**8.** ***The broader context.*** This case highlights the – largely assumed – wish of the relevant domestic authorities to limit compensation of victims of a miscarriage of justice to exceptional cases only. This is their right, as compensation in such cases is not provided for by the Convention itself but rather by Article 3 of Protocol No. 7 to the Convention, which the United

Kingdom has not signed or acceded to. It is noteworthy that after the judgment in *Allen*, the law in England and Wales was changed so as to render compensation even more difficult to obtain. By contrast, most States provide for strict State liability in the event of miscarriages of justice.

In practice, the current system operates in such a way that the test set by the legislation represents a hurdle which is virtually insurmountable. According to the information provided by the Government during the hearing, only around three percent of individuals whose criminal convictions have been quashed with no ensuing conviction (and who are thus to be considered innocent) obtain compensation for a wrongful conviction [out of 346 applications, only 13 were granted between 2017 and 2022]. In other words, it is extremely rare for innocent people to succeed in persuading the Secretary of Justice that they have not committed the crime in respect of which their convictions have been quashed and are thus considered innocent. Thus, the concerns expressed above are not purely theoretical. It is also quite astonishing that the Crown Prosecution Service, in the case of Mr Nealon, deemed it unnecessary to reopen his trial – which could have definitively established his innocence – as he had already spent 17 years in prison. This is a highly undesirable attitude towards the presumption of innocence.

**9.** ***Conclusion.*** Overall, the approach of the majority is restricted solely to the positive imputation of guilt, in other words, there will only have been a violation where there has been an imputation of criminal liability, that is, where the wording in the decisions casts doubt on the applicants' innocence (see paragraphs 164 and 167 of the present judgment). This risks rendering Article 6 § 2 theoretical and illusory, as it implies that, so long as no wording to the effect that the applicant is guilty or not innocent is included in decisions, there will be Convention-compliance, regardless of the reality of the decision-making process. This significantly reduces the practical and effective nature of the second aspect of Article 6 § 2.

In the light of all of the above considerations, we believe that there has been a violation of the presumption of innocence guaranteed by Article 6 § 2 of the Convention.