Easter Term
[2011] UKSC 18
On appeal from: [2009] EWCA Civ 1291; [2010] NICA 3

JUDGMENT

R (on the application of Adams) (FC) (Appellant) *v* Secretary of State for Justice (Respondent)

In the Matter of an Application by Eamonn MacDermott for Judicial Review (Northern Ireland)

In the Matter of an Application by Raymond Pius McCartney for Judicial Review (Northern Ireland)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Judge
Lord Kerr
Lord Clarke

JUDGMENT GIVEN ON

11 May 2011

Heard on 15, 16 and 17 February 2011

Appellant
Tim Owen QC
Hugh Southey QC
(Instructed by Hickman and Rose)

Respondent
Robin Tam QC
James Strachan
(Instructed by Treasury Solicitor)

Appellant
John O'Hara QC
Joseph Brolly
(Instructed by McCartney and Casey)

Respondent
Paul Maguire QC
David Scoffield BL
(Instructed by Departmental Solicitor's Office)

Appellant
Eilis McDermott QC
Donal Sayers BL
(Instructed by MacDermott, McGurk and Partners)

Respondent
Paul Maguire QC
David Scoffield BL
(Instructed by Departmental Solicitor's Office)

Intervener (JUSTICE)
Alex Bailin QC
Alison MacDonald
(Instructed by Kirkland & Ellis International LLP)

Intervener (Barry George)
Ian Glen QC
Gordon Bishop
(Instructed by Wells Burcombe)

LORD PHILLIPS

Introduction

1. The three appellants in these two appeals were each convicted of murder. Each had his conviction quashed pursuant to a reference to the Court of Appeal by the Criminal Cases Review Commission ("CCRC") in the exercise of its powers under Part II of the Criminal Appeal Act 1995 ("the 1995 Act"). In each case no order was made for a retrial. Each claimed compensation from the Secretary of State pursuant to section 133 of the Criminal Justice Act 1988 ("section 133"). That section applies to England and Wales, to Northern Ireland and to Scotland. I shall not refer to provisions which cater for differences of procedure in Scotland. The most material part of that section provides:

> "(1)…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…"

In each case the claim for compensation was refused by the Secretary of State, whose decisions were upheld on judicial review both at first instance and on appeal. The common issue that arises in relation to each appeal is the meaning of "miscarriage of justice" in section 133. In the case of Adams there is a second issue, which is the meaning of "a new or newly discovered fact".

2. Lord Hope has set out the background to the statutory right to compensation provided by section 133 and I need not repeat his summary. Lord Kerr has set out in detail the relevant facts in the appeals of Mr MacDermott and Mr McCartney and I gratefully adopt his account of these. It remains for me to summarise the facts relevant to the appeal of Mr Adams. They can be shortly stated. A more detailed summary can be found in the extract of the judgment of Simon J at first instance, annexed to the judgment of the Court of Appeal [2009] EWCA Civ 1291; [2010] QB 460.

The facts in Mr Adams' appeal

3. On 18 May 1993 Mr Adams was convicted in the Crown Court at Newcastle of the murder of a man called Jack Royal and sentenced to life imprisonment. He appealed to the Court of Appeal and on 16 January 1998 his appeal was dismissed. Some nine years later his case was referred to the Court of Appeal by the CCRC on three grounds. The first, and only material ground, was that incompetent defence representation had deprived him of a fair trial. On 12 January 2007 the Court of Appeal allowed his appeal on this ground.

4. The relevant shortcomings in the conduct of Mr Adams' defence were, in large measure, the result of a late change of his counsel. This was made when those originally instructed to represent him had to withdraw from the case because of a conflict of interest. Those instructed to replace them were hard pressed to prepare for the trial and failed to consider relevant "unused material". Some of this had been disclosed by the prosecution. Some was available on a computer database known as the Holmes database.

5. The case against Mr Adams was essentially based on the evidence of a single witness, Mr Kevin Thompson. His evidence was supported by that of two police officers. It was the defence case that Mr Thompson was lying, that he had entered into a deal with the police to give evidence against Mr Adams, and that he had been fed with information about Mr Royal's murder by the police. The evidence which had been overlooked by defence counsel would have provided valuable assistance in cross-examining Mr Thompson and the two police officers. The Court of Appeal concluded that, had it been available and deployed, the jury might not have been satisfied of Mr Adams' guilt. Accordingly the court quashed the conviction, but in doing so stated expressly that they were not to be taken as finding that, if the failings on the part of the defence lawyers had not occurred, Mr Adams would inevitably have been acquitted: [2007] 1 Cr App R 449 at para 157.

Miscarriage of Justice

6. Section 133(1) reproduces, in almost identical wording, the following provision in article 14(6) of the International Covenant on Civil and Political Rights 1966, which this country ratified in May 1976 ("article 14(6)" of the "ICCPR"). I shall emphasise the material differences:

> "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… ”

7. The reference to “a final decision” is accommodated by a provision in section 133(5) which defines “reversed” as referring to a conviction which has been quashed on an appeal out of time or on a reference under the 1995 Act.

The possible meanings of “miscarriage of justice”

8. The meaning of “miscarriage of justice” in section 133 received consideration by the House of Lords in *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18; [2005] 1 AC 1, when rejecting a claim for compensation by Mr Mullen. He had been convicted of terrorist offences. His conviction had been quashed by an appeal out of time. This was not because there was any doubt that he had committed the offences of which he was convicted. His conviction was quashed because he had been seized and brought to this country from Zimbabwe in circumstances that had involved a flagrant abuse of power. It was not suggested that there was any defect in the trial process itself. The House held that in these circumstances Mr Mullen’s conviction had not been quashed on the ground of a “miscarriage of justice” within the meaning of section 133. Lord Steyn expressed the view that this phrase only extended to the conviction of someone subsequently shown to be innocent. Lord Bingham of Cornhill expressed doubt as to whether this was correct. Both were agreed that section 133 was enacted to give effect to article 14(6) and that the meaning of the latter should govern the interpretation of the section. They were not, however, agreed as to the meaning of article 14(6). Lord Rodger of Earlsferry accepted the interpretation reached by Lord Steyn. Lord Walker of Gestingthorpe considered that Lord Steyn had given “powerful reasons” for his conclusion, but preferred not to go beyond the limited common ground for allowing the appeal. Lord Scott expressed no view on the difference between Lord Bingham and Lord Steyn.

9. “Miscarriage of justice” is a phrase that is capable of having a number of different meanings. In giving the judgment of the Court of Appeal in relation to Adams’ case Dyson LJ divided the circumstances in which convictions may be quashed on the basis of the discovery of fresh evidence into four categories, which I shall summarise in my own words.

> (1) Where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.

(2) Where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.

(3) Where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.

(4) Where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

These four categories have provided a useful framework for discussion.

10. There are relatively few domestic authorities that bear on the meaning of "miscarriage of justice" in section 133 and none which provides a definitive answer. In these circumstances, before considering those authorities, I propose to consider extrinsic sources that might be expected to assist with the interpretation of this phrase.

Parliamentary material

11. Mr Bailin QC, appearing for JUSTICE as intervener, submits that a statement made by Earl Ferrers, the Minister of State at the Home Office, throws light on the meaning of "miscarriage of justice". The statement was made in the course of debate on the clause that was to become section 133: see Hansard (HL Debates), 22 July 1988, cols 1630-1632. At the outset Earl Ferrers explained that the object of the clause was to give statutory effect to the United Kingdom's obligations under article 14. Lord Hutchinson of Lullington then asked the very question that lies at the heart of these appeals. He contrasted a new fact which resulted in the quashing of a conviction because it raised a lurking doubt in the mind of the Court of Appeal about the safety of the conviction and a new fact which caused the Secretary of State to advise that a defendant should be pardoned because he had been shown to be innocent. Which, he asked, amounted to a miscarriage of justice under the clause? This, he stated, was a crucial point.

12. If it is not contempt of Parliament to observe that Lord Bingham, in his judicial capacity, was uncertain of the answer to this question, after giving it detailed consideration in *Mullen*, it is not, I hope, contempt of Parliament to suggest that Earl Ferrers, when faced with the question *ex improviso* in the course of debate, may have had to seek assistance from an official before giving the answer. At all events the answer that he gave was:

> "The normal course is to refer cases to the Court of Appeal and to regard its view as binding."

13. Mr Bailin submits that, in accordance with Lord Hope's observations on the use that can be made of parliamentary material in *R v A (No 2)* [2002] 1 AC 45 at para 81, this statement binds the Secretary of State to accept that the question of whether there has been a miscarriage of justice must be determined from the judgment of the Court of Appeal in the particular case and that, as the Court of Appeal does not and cannot rule on whether the defendant is innocent, that cannot be the test of whether there has been a miscarriage of justice.

14. I do not accept this submission. The reply given by Earl Ferrers did not answer the question posed by Lord Hutchinson. To be blunt it made no sense. It affords no guidance on the meaning in section 133 of "miscarriage of justice". The relevant part of the debate clearly indicates that the intention of Parliament in enacting section 133 was to give effect to the obligation imposed by article 14(6). It does not suggest that Parliament intended that the meaning of section 133 should differ in any way from the meaning of article 14(6). This reinforces the rule of statutory interpretation that raises a presumption that, where a statute is passed in order to give effect to the obligations of the United Kingdom under an international convention, the statute should be given a meaning that conforms to that of the convention: see *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116, 141 and *Bennion on Statutory Interpretation*, 5th ed (2008), section 221.6. What then is the meaning of "miscarriage of justice" in article 14(6)? In answering this question the provisions of the Vienna Convention on the Law of Treaties should be applied: see *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 283, per Lord Diplock.

The interpretation of Article 14(6)

15. As the wording of the English text of article 14(6) is virtually identical to that of section 133, the former throws no light on the meaning of the latter. Article 33 of the Vienna Convention permits reference to the text of a convention in an alternative authenticated language. In *Mullen* Lord Steyn at para 47 derived assistance from the French text of article 14(6). This uses the phrase "une erreur judiciare" for "miscarriage of justice". Lord Steyn stated that this was a technical expression indicating a miscarriage of justice in the sense of the conviction of someone who was innocent. He did not explain the basis for this assertion and Lord Bingham did not agree with it. He expressed the view at para 9 that "erreur judiciare" could be understood as equivalent to "miscarriage of justice" in its broad sense. Lord Bingham's interpretation of the French text is to be preferred to that of Lord Steyn. The difference between them received detailed consideration by Girvan LJ in *In re Boyle's Application* [2008] NICA 35 at paras 11-13. He

concluded that the French term was as elastic as the English "miscarriage of justice". In his written case at para 4.32 Mr Tam QC for the Secretary of State invited the Court to reject Girvan LJ's analysis of the French law. In these circumstances the Court allowed Mr Owen to adduce a witness statement from Dr Cristina Mauro, who teaches Criminal Procedure as an Assistant Professor at Université Panthéon-Assas at Paris. She confirmed that Girvan LJ's interpretation of "erreur judiciare" was correct, and Mr Tam accepted this to be the case.

16. Had the French text given a more precise meaning to article 14(6) than the English this would have been a legitimate aid to the interpretation of the latter. As it is the French text leaves us no further forward. Article 31(3)(b) of the Vienna Convention also permits one to take into account

> "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

17. Lord Steyn, Girvan LJ and Dr Mauro, in progressively greater detail, have examined articles 622 to 626 of the French Code de Procédure Pénale, which give effect to article 14(6). Once again the analysis of the latter two is to be preferred to that of Lord Steyn. This indicates that in France a conviction will be reviewed where a "new element" gives rise to serious doubts about guilt and that the reviewing court can then either quash the conviction on the ground that the new element proves that the defendant is not guilty or direct a retrial. Compensation will be recoverable in the former event or, if there is a retrial, if this results in an acquittal. This practice on the part of only one of the many signatories to the ICCPR does not provide a guide to the meaning of article 14(6) but it does demonstrate that proof of innocence has not been universally adopted as the test of entitlement to compensation. It has not been suggested that there is any consistency of practice on the part of the signatories that assists in determining the meaning of article 14(6).

18. If it is not possible to deduce the meaning of article 14(6) from subsequent practice in its application, what of the travaux préparatoires? Article 32 of the Vienna Convention permits recourse to these where necessary to determine the meaning to be attributed to the term of a treaty in the light of its "object and purpose" – see article 31. The Court has been provided with relevant comments on the travaux in *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* by D Weissbrodt (2001) and *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* by M Bossuyt (1987).

19. So far as the precise meaning of "miscarriage of justice" is concerned the travaux are inconclusive. They disclose that Mrs Roosevelt was opposed to the inclusion of article 14(6) on the ground that its implementation would cause significant technical difficulties because of the diversity of national legislation. They show concern by some, including the British delegate, that the provision should not create an obligation to pay compensation when a conviction was reversed on appeal. Of most significance is the rejection by 22 votes to 11 with 40 abstentions of an amended provision initially proposed by Israel, with input from France and Afghanistan. This reads:

> "The judicial recognition of the innocence of a convicted person shall confer on him the right to request the award of compensation in accordance with the law in respect of any damage caused him by the conviction."

20. While this provides no positive indication of precisely what the state parties intended "miscarriage of justice" to mean, it makes it difficult to argue that they intended it to mean "conviction of the innocent". Lord Bingham suggested at para 9 in *Mullen* that the phrase "miscarriage of justice" may have commended itself to the parties because of the latitude of interpretation that it offered and it seems to me that this may well be the case.

21. It is, I believe, possible to make some more positive conclusions about what it was that the states who were involved in the drafting of article 14(6) were trying to achieve. They were concerned with the emergence of a new fact after the completion of the trial process, including review on appeal. Article 14(5) provides that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law. Article 14(6) applies to the discovery of a new fact after that final decision. Compensation was only payable where the new fact demonstrated *conclusively* that there had been a miscarriage of justice. Thus miscarriage of justice had to be the kind of event that one could sensibly require to be proved conclusively.

22. Article 14 is, in general, concerned with the right to a fair trial. Most of its provisions relate to procedure. One might have expected article 14(6) similarly to have been concerned with the consequences of shortcomings in procedure. The travaux do not suggest that this was the primary concern of the delegates. It is perhaps significant that Mrs Roosevelt and Ms Bowie did not consider that the provision belonged in the Covenant and suggested deleting it. What the delegates appear to have been primarily concerned about was not errors of procedure, but the emergence of fresh facts that were inconsistent with the conviction of the defendant. Thus, at the outset, the Philippines suggested that the circumstances in which the provision should apply should be spelt out and that these should be

where the true offender had confessed and there were no reasonable grounds to doubt his confession or where the fact or event which was the basis of the conviction was shown beyond reasonable doubt never to have taken place. A comment by Mrs Roosevelt that compensation should be denied to someone who deliberately concealed facts which *would have exonerated him* if discovered (my emphasis) is a further example of this approach, as is the proposed amendment to which I have referred at para 19 above. The fact remains, however, that this amendment was not carried and that the travaux show concern on the part of some delegates that the provision under discussion would allow compensation to "persons who were clearly guilty but whose conviction had been annulled for reasons of form or procedure" while others appear to have considered that the provision should provide a guarantee for lawful process.

23. The travaux clearly demonstrate that the parties intended article 14(6) to cover the situation where a newly discovered fact demonstrated conclusively that the defendant was innocent of the crime of which he had been convicted. They were not, however, prepared to agree an interpretation which restricted the ambit of article 14(6) to this situation. In the 14th and final session it is recorded that most of the Committee agreed that only "adequate legislation" could solve the technical difficulties involved in the problem of compensation for a miscarriage of justice. Thus, while the principle was agreed that there should be compensation for the consequences of a conviction reversed on the ground of conclusive proof of a miscarriage of justice as a result of the discovery of new evidence after the conclusion of the criminal process, and that this would cover the case of a convicted man who was shown to be innocent, it seems to have been left to the individual parties by domestic legislation to identify the precise parameters of the miscarriage of justice that would give rise to a right to compensation. The words "according to law" were added to the article by a late amendment.

24. It would have been possible for the contracting parties to have agreed that any person whose conviction was reversed by reason of a newly discovered fact should be given compensation for the consequences of the conviction. This could have been justified on the basis that the reversal of the conviction raised a presumption of innocence and that compensation should be paid on the basis of that presumption. The parties did not take that course. The fact that they did not do so, and the requirement that the miscarriage of justice should be established conclusively, indicates so it seems to me, an anxiety not to agree to an entitlement to compensation that would result in compensation being paid to those who had in fact committed the crimes of which they were convicted, at least on a substantial scale.

25. In these circumstances the fact that section 133 is intended to give effect to the obligation imposed by article 14(6) is of limited assistance in interpreting that section. It would not be right, however, when interpreting section 133 to lose sight

of the fact that it is giving effect to a convention agreed by parties with varying systems of criminal justice. Article 14(6) is applicable to criminal trials in jurisdictions that have jury trials and jurisdictions that do not, to civil and to common law jurisdictions. The meaning given to "miscarriage of justice" should be one that is capable of application to the systems of criminal justice of the other parties to the covenant.

26. I have not found any other extrinsic material to be of assistance. In *Mullen* Lord Bingham at para 9(3) considered the jurisprudence of the United Nations Human Rights Committee and concluded that this did not assist. He reached the same conclusion in relation to the explanatory report of the Steering Committee for Human Rights in relation to article 3 of the Seventh Protocol to the European Convention on Human Rights. I agree with Lord Bingham for the reasons which he gave.

Mullen

27. I now turn to consider the decision of the House of Lords in *Mullen.* This task has been undertaken in a little detail by Lord Hope, which shortens the comments that I wish to make on this decision.

28. The reason why the appeal in *Mullen* did not succeed was that 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. At para 8 Lord Bingham said:

> "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."

It was this statement that led Mr Owen to advance, initially, an argument that section 133 was directed at some failure in the trial process. This led him to submit that if, after an impeccably conducted trial, the discovery of DNA evidence demonstrated conclusively that the convicted defendant was innocent, no claim for compensation would lie under section 133. He was right subsequently to acknowledge that this could not be correct, but that acknowledgement raised a question as to the validity of Lord Bingham's observation that section 133 applied to "failures of the trial process". I also question that statement. It is not the failure of the trial process that constitutes a miscarriage of justice, but the wrongful

conviction that may be caused by it. A wrongful conviction is capable of amounting to a miscarriage of justice whether or not it has been caused by a failure of the trial process. I do not believe that Lord Bingham can have intended to exclude from the ambit of section 133 convictions quashed as the result of the discovery of new facts in circumstances where there has been no failure of the trial process. That, I believe, is the situation with which section 133 is, at least primarily, concerned.

29. There is a question as to the assistance that is to be derived from the following earlier comments in para 4 of Lord Bingham's judgment:

> "The expression 'wrongful convictions' is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

30. In *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin) at para 25 I stated that in this passage Lord Bingham was identifying the types of miscarriage of justice that would fall within section 133. On reflection I believe that I was wrong. As Lord Hope has pointed out in para 90 Lord Bingham was discussing the meaning of "wrongful conviction" in the context of the previous ex gratia scheme.

31. There is a further point to be made in relation to para 4 of Lord Bingham's speech. He has included in the catalogue of cases resulting in the conviction of someone "who should not have been convicted" the case of a judicial misdirection. A judicial misdirection could not be a new or newly discovered fact, but if it were it would fall into Dyson LJ's third category. So might a conviction based on

flawed expert evidence: see *R (Allen) (formerly Harris)) v Secretary of State for Justice* [2008] EWCA Civ 808; [2009] 2 All ER 1. Thus para 4 would appear to embrace all four of Dyson LJ's categories.

32. In para 9 Lord Bingham observed, when considering section 133, that, while "miscarriage of justice" can be used to describe the conviction of the demonstrably innocent, it can be and has been used to describe cases in which defendants, guilty or not, "certainly should not have been convicted." This also has been treated by some as expressing Lord Bingham's view of the scope of section 133, but I do not think that it is clear that this was so.

33. In these circumstances, I agree with Lord Hope that Lord Bingham's speech does not provide significant positive assistance in interpreting "miscarriage of justice" in section 133. It is of assistance in respect of his comments on Lord Steyn's answer to that question.

34. Lord Steyn's conclusion in *Mullen* that "miscarriage of justice" was restricted to the conviction of an innocent person was largely founded on his misreading of the French text of article 14(6) and of the position in France. Shorn of that support, his speech does not provide compelling justification for his conclusion.

35. For all these reasons I do not believe that *Mullen* helps very much in determining the meaning of "miscarriage of justice" in section 133. The cases that have followed *Mullen,* including those before this Court, have proceeded on the basis that Lord Bingham had laid down an alternative test to that of Lord Steyn, and concluded, in each case, that neither test was satisfied. In the circumstances there is nothing to be gained by considering those decisions. I agree with Lord Hope that a fresh approach is required. I propose to adopt the four categories identified by Dyson LJ as the framework for discussion.

The nature of the exercise

36. The wording of section 133, following that of article 14(6), might suggest that the terms of the judgment of the court that reverses the conviction will establish whether the entitlement to compensation has been made out. It speaks of a conviction being reversed "*on the ground that* a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice" (emphasis added). That is not, however, the test for quashing a conviction in this jurisdiction. The words "on the ground that" must, if they are to make sense, be read as "in circumstances where". Section 133(1) provides that the compensation

will be paid by the Secretary of State, and section 133(2) provides for a two year time limit for application for compensation to the Secretary of State. Thus it is for the Secretary of State to decide whether the requirements of section 133 are satisfied, an exercise which is, of course, subject to judicial review. The Secretary of State first has to consider whether a new or newly discovered fact has led to the quashing of a conviction. If it has, he then has to consider whether that fact shows beyond reasonable doubt that there has been a miscarriage of justice, applying the true meaning of that phrase. The Secretary of State will plainly have regard to the terms of the judgment that quashes the conviction, but ultimately he has to form his own conclusion on whether section 133 is satisfied.

The object of the exercise

37. I think that the primary object of section 133, as of article 14(6), is clear. It is to provide entitlement to compensation to a person who has been convicted and punished for a crime that he did not commit. But there is a subsidiary object of the section. This is that compensation should not be paid to a person who has been convicted and punished for a crime that he did commit. The problem with achieving both objects is that the quashing of a conviction does not of itself prove that the person whose conviction has been quashed did not commit the crime of which he was convicted. Thus it is not satisfactory to make the mere quashing of a conviction the trigger for the payment of compensation. It was this problem which led to the adoption of the imprecise language of article 14(6), which has been reproduced in section 133. In interpreting section 133 it is right to have in mind the two conflicting objectives. It is necessary to consider whether the wording of the section permits a balance to be struck between these two objectives and, if so, how and where that balance should be struck. I turn to consider Dyson LJ's four categories having in mind these considerations. I shall deviate from the order in which he set them out.

Category 4: where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted

38. This category is derived from Lord Bingham's speech in *Mullen.* As I have explained, I do not believe that he put it forward as falling within the scope of section 133. As I understand it, the category embraces an abuse of process so egregious that it calls for the quashing of a conviction, even if it does not put in doubt the guilt of the convicted person. I would not interpret miscarriage of justice in section 133 as embracing such a situation. It has no bearing on what I have identified as the primary purpose of the section, which is the compensation of those who have been convicted of a crime which they did not commit. If it were treated as falling within section 133 this would also be likely to defeat the

subsidiary object of section 133, for it would result in the payment of compensation to criminals whose guilt was not in doubt.

Category 3: Fresh evidence rendering the conviction unsafe

39. Dyson LJ propounded this test as requiring consideration of whether a fair-minded jury could properly convict if there were to be a trial which included the fresh evidence. This raises the question, which I shall consider further when I come to category 2, of whether section 133 requires the Secretary of State to consider the reaction to fresh evidence of a fair-minded jury. Put another way, the situation under consideration is one where the fresh evidence reduces the strength of the case that led to the claimant's conviction, but does not diminish it to the point where there is no longer a significant case against him.

40. I would not place this category within the scope of section 133 for two reasons. The first is that it gives no sensible meaning to the requirement that the miscarriage of justice must be shown "beyond reasonable doubt", or "conclusively" in the wording of article 14(6). It makes no sense to require that the new evidence must show conclusively that the case against the claimant is less compelling. It is tantamount to requiring the Secretary of State to be certain that he is uncertain of the claimant's guilt.

41. My second reason is that, if category 3 were adopted as the right definition of "miscarriage of justice", it would not strike a fair balance between the two objectives of section 133. The category of those who are convicted on evidence which appears to establish guilt beyond reasonable doubt, but who have their convictions quashed because of fresh evidence that throws into question the safety of their convictions, will include a significant number who in fact committed the offences of which they were convicted. This is the inevitable consequence of a system which requires guilt to be proved beyond reasonable doubt.

42. When these two factors are considered together they lead to the conclusion that section 133 does not, on its true interpretation, apply to category 3.

Category 1: Fresh evidence that shows clearly that the defendant is innocent of the crime of which he was convicted

43. Having considered the categories which were at one extremity of Dyson LJ's list, I now turn to the category at the other. Plainly section 133 will embrace this category, but does it provide the exclusive definition of "miscarriage of justice" in that section? There are a number of points to be made in favour of this

suggestion. The first is that it gives section 133 a perfectly natural and logical meaning, indeed it is the meaning that the man in the street would be likely to accord to the wording of section 133.

44. More particularly, if "miscarriage of justice" is read as meaning the conviction of someone who is innocent, it makes perfect sense of the requirement that the new fact should prove this beyond reasonable doubt.

45. Next it gives section 133 a meaning which is eminently practicable. Objection has been made to category 1 on the ground that it is not the role of the Court of Appeal, when reviewing a conviction, to rule whether the defendant is innocent of the crime of which he was convicted. In *R v McIlkenny* (1991) 93 Cr App R 287, 311 Lloyd LJ observed that the Court of Appeal was neither obliged nor entitled to state that an appellant was innocent. Its task was simply to decide whether the verdict of the jury could stand. He described this as a point of great constitutional importance. I think that he was right. The point was well put by the Court of Appeal for Ontario in *R v Mullins-Johnson* 2007 ONCA 720; 87 OR (3d) 425. The appellant had been convicted of murder of his 4 year old niece and served 12 years in prison. His conviction was based on expert evidence that the autopsy indicated that the young girl had been sexually abused and suffocated. Subsequent medical evidence totally discredited the evidence given at the trial, so that it became clear that there was no reliable pathological evidence either of sexual abuse or of homicidal asphyxia of the child. The case was referred to the Court of Appeal on terms that it should treat it as an appeal on fresh evidence. In a passage which merits citation in full, the Court explained why it would not be proper for it in these circumstances to make a declaration that the appellant was in fact innocent:

> "22 The fresh evidence shows that the appellant's conviction was the result of a rush to judgment based on flawed scientific opinion. With the entering of an acquittal, the appellant's legal innocence has been re-established. The fresh evidence is compelling in demonstrating that no crime was committed against Valin Johnson and that the appellant did not commit any crime. For that reason an acquittal is the proper result.
>
> 23 There are not in Canadian law two kinds of acquittals: those based on the Crown having failed to prove its case beyond a reasonable doubt and those where the accused has been shown to be factually innocent. We adopt the comments of the former Chief Justice of Canada in *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken*, Annex 3, pp. 342:

> [A] criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of criminal law.
>
> 24 Just as the criminal trial is not a vehicle for declarations of factual innocence, so an appeal court, which obtains its jurisdiction from statute, has no jurisdiction to make a formal legal declaration of factual innocence. The fact that we are hearing this case as a Reference under section 696.3(3)(a)(ii) of the *Criminal Code* does not expand that jurisdiction. The terms of the Reference to this court are clear: we are hearing this case 'as if it were an appeal'. While we are entitled to express our reasons for the result in clear and strong terms, as we have done, we cannot make a formal legal declaration of the appellant's factual innocence.
>
> 25 In addition to the jurisdictional issue, there are important policy reasons for not, in effect, recognizing a third verdict, other than 'guilty' or 'not guilty', of 'factually innocent'. The most compelling, and, in our view, conclusive reason is the impact it would have on other persons found not guilty by criminal courts. As Professor Kent Roach observed in a report he prepared for the *Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, 'there is a genuine concern that determinations and declarations of wrongful convictions could degrade the meaning of the not guilty verdict' (p 39). To recognize a third verdict in the criminal trial process would, in effect, create two classes of people: those found to be factually innocent and those who benefited from the presumption of innocence and the high standard of proof beyond a reasonable doubt."

46. But the decision whether there has been a miscarriage of justice within section 133 is not for the court but for the Secretary of State. He should have no difficulty in deciding whether new evidence that has led to the quashing of a conviction shows beyond reasonable doubt that the defendant was innocent of the crime of which he was convicted. Where the prosecution has satisfied the jury beyond reasonable doubt that a defendant is guilty, evidence that demonstrates beyond reasonable doubt that he was in fact innocent will not be equivocal. Even though it is not for the Court of Appeal, when quashing the conviction, to express its opinion that the defendant is innocent, the reasons given for quashing the conviction are unlikely to leave any doubt of this, just as was the position in *Mullins-Johnson.*

47. The other obvious point in favour of category 1 is that it precludes all possibility of a defendant who in fact committed the crime of which he was convicted receiving compensation for the consequences of his conviction. If this is to be treated as being of paramount importance, then category 1 is the only satisfactory interpretation of section 133. The Law Commission of New Zealand in its 1998 Report No 49 on "Compensating the Wrongly Convicted" advised at para 127

> "A requirement to prove innocence is, however, necessary to prevent the 'guilty' claimant, acquitted on a technicality, from profiting from the crime. It recognises that it is a person's innocence which provides the justification for compensation in the first place."

48. This brings me to the last point that is advanced in favour of category 1. It is argued that it is not in practice possible to draw a line between category 2 and category 3. Unless category 1 is adopted as the correct interpretation of section 133, defendants whose convictions are quashed on technicalities will profit from compensation. I shall consider this argument when I deal with category 2.

49. The first argument against restricting the ambit of section 133 to category 1 is that the parties to article 14(6) voted against an amendment which would have done this.

50. The second is that this will deprive some defendants who are in fact innocent and who succeed in having their convictions quashed on the grounds of fresh evidence from obtaining compensation. It will exclude from entitlement to compensation those who no longer seem likely to be guilty, but whose innocence is not established beyond reasonable doubt. This is a heavy price to pay for ensuring that no guilty person is ever the recipient of compensation. Does category 2, or some similar formulation of miscarriage of justice, provide a more satisfactory approach to the desire to provide compensation to the innocent without rewarding the guilty that both accords with the language of the section and is workable in practice?

Category 2: Fresh evidence such that, had it been available at the trial no reasonable jury could convict the defendant

51. This category applies to the evidence, including the fresh evidence, the test that a judge has to apply when considering an application at the end of the prosecution case for dismissal of a charge on the ground that the defendant has no case to answer. It focuses on the evidence before the jury. If the fresh evidence

were always evidence of primary fact, or new expert evidence, the test might be satisfactory. The position is not, however, as simple as that. The new evidence that leads to the quashing of a conviction is very often not primary evidence that bears directly on whether the defendant committed the crime of which he was convicted, but evidence that bears on the credibility of those who provided the primary evidence on which he was convicted. Both of the appeals before the Court fall into this category. So does the example of category 2 given by Dyson LJ: fresh evidence which undermines the creditworthiness of the sole witness for the prosecution. Here one can run into a problem that is peculiar to the criminal procedures that apply in common law jurisdictions.

52. Under common law procedures the evidence that is permitted to be placed before the jury is screened by a number of rules that are designed to avoid the risk that the jury will be unfairly prejudiced and to ensure that the trial is fair. Thus section 78 of the Police and Criminal Evidence Act 1984 gives the judge a general jurisdiction to exclude evidence on the grounds of fairness and section 76A of the same Act contains a little code governing the admissibility of a confession. So does section 8(2) of the Northern Ireland (Emergency Provisions) Act 1978, which was applicable to the critical evidence adduced against the defendants in the second appeal. Often it will be appropriate for the judge to hold a voir dire in order to decide whether or not evidence can be admitted. The question of whether there is evidence upon which a jury can properly convict is taken after the judge has screened from the jury evidence which, under the relevant procedural code, he has ruled to be inadmissible. That is often a difficult judicial task. I do not believe that section 133 should be so interpreted as to impose on the Secretary of Sate the task of deciding whether the fresh evidence would have rendered inadmissible the primary evidence to which it related, in order to answer the question whether there would have been a case upon which a reasonable jury could convict.

53. There is a further difficulty with category 2. The question of whether a reasonable jury could properly convict falls to be answered having regard to the fact that a jury must be satisfied of guilt beyond reasonable doubt. Section 133 requires the Secretary of State to be satisfied beyond reasonable doubt that a miscarriage of justice has occurred. Category 2 thus operates as follows: compensation will be payable where the Secretary of State is satisfied beyond reasonable doubt that no reasonable jury could have been satisfied beyond reasonable doubt that the defendant was guilty. This does not seem a very sensible test.

54. The final point to make about category 2 is that it applies a test the result of which depends critically on common law procedural rules. As the test is derived from article 14(6), it would be preferable if it were one more readily applicable in other jurisdictions.

55. For these reasons I do not consider the second category, as formulated by Dyson LJ, provides a satisfactory definition of "miscarriage of justice". I would replace it with a more robust test of miscarriage of justice. **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.

Retrial

56. The provisions in relation to retrial introduced into section 133 in the circumstances described by Lord Hope at paras 103 and 104 of his judgment raise a problem. A retrial will only be ordered where, although it quashes the defendant's conviction on the grounds of fresh evidence, the Court of Appeal considers that there remains a case against him that is fit for trial. Assuming that they are correct in that view, the fresh evidence could never fall within the scope of section 133 if it is right to interpret that section as being limited to either category 1 or category 2, as formulated by Dyson LJ or as I have reformulated it. The introduction into the section of the provisions in relation to retrial would make more sense if section 133 embraced category 3. In that case, however, one might have expected compensation to be payable automatically if the retrial ended in an acquittal, but the amended section 133 does not so provide.

57. It does not follow, however, that category 1 or category 2 cannot stand with section 133, as amended. Entitlement to compensation does not turn on the view that the Court of Appeal takes of the new evidence. The defendant may contend, even where a retrial is ordered, that the fresh evidence proves his innocence. Although the Court of Appeal is not persuaded of this, it may become apparent in the course of the retrial that the defendant is correct. Thus the provisions in relation to retrial make sense, even if category 1 or category 2 represents the correct interpretation of "miscarriage of justice".

Article 6(2) of the European Convention on Human Rights

58. The Strasbourg Court has stated that one of the functions of article 6(2) is to protect an acquitted person's reputation from statements or acts that follow an acquittal which would seem to undermine it – see *Taliadorou and Stylianou v Cyprus* (Application Nos 39627/05 and 39631/05) (unreported) 16 October 2008, at para 26. The Court's expansion of what would seem to be a rule intended to be part of the guarantee of a fair trial into something coming close to a principle of the law of defamation is one of the more remarkable examples of the fact that the Convention is a living instrument. Mr Owen QC for Mr Adams referred the Court to a series of decisions of the Strasbourg Court in which it was held to be a violation of article 6(2) for a state to refuse compensation to which an applicant who had been held in preventative detention was normally entitled on acquittal at the end of a criminal trial on the ground that his acquittal did not establish his innocence. Lord Hope has summarised the details and effect of those authorities. Mr Owen argued that their effect was that, once Mr Adams' conviction had been quashed, he was entitled to be treated as innocent in the context of his claim for compensation. A rather different argument based on article 6(2) was rejected by Lord Steyn in *Mullen* at para 44. Mr Owen first advanced the present argument when appearing for the claimant in *R(Allen) (formerly Harris)) v Secretary of State for Justice* [2009] 2 All ER 1. In that case the claimant's claim for compensation under section 133 was rejected on the grounds that his case satisfied neither Lord Steyn's test in *Mullen* nor the test that Lord Bingham had been thought to advance in that case. Giving the only reasoned judgment, Hughes LJ comprehensively rejected Mr Owen's argument based on article 6(2) for a series of ten reasons. On the present appeals Lord Hope has held that reliance on article 6(2) is misplaced for reasons that have much in common with those of Hughes LJ. I agree with both of them. I would add this. 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.

Newly discovered fact

59. Mr Adams' appeal raises a second issue. Were the facts that led to the quashing of his conviction "newly discovered" despite the fact that they were contained in documents disclosed to his legal representatives before his trial or available on the Holmes database? The phrase "newly discovered" raises a further

difficult problem of interpretation, for it does not indicate to whom the discovery must be new.

60. Ireland has given effect to article 14(6) by section 9 of the Criminal Procedure Act 1993. Section 9(6) of that Act provides:

> "'newly-discovered fact' means—
>
> > (a) where a conviction was quashed by the Court on an application under section 2 or a convicted person was pardoned as a result of a petition under section 7, or has been acquitted in any re-trial, a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings…."

I would adopt this generous interpretation of "newly discovered fact".

61. Section 133(1), following the almost identical wording of article 14(6), ends with the proviso :

> "unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted."

62. This proviso is significant in more than one way. First, the use of the word "non-disclosure" would seem to equate the new "discovery" with "disclosure". The latter word has a broad ambit and, in context, suggests to me the bringing of a fact into the public domain and, in particular, the disclosure of that fact to the court. Secondly, I read the provision as excluding a right to compensation where the person convicted has deliberately prevented the disclosure of the relevant fact, or where the non-discovery of that fact is otherwise attributable to his own fault.

63. We are envisaging a situation where a claimant has been convicted, and may well have served a lengthy term of imprisonment, in circumstances where it has now "been discovered" that a fact existed which either demonstrates that he was innocent or, at least, undermines the case that the prosecution brought against him. If he was aware of this fact but did not draw it to the attention of his lawyers, and he did not deliberately conceal it (which would bring the fact within the proviso), this will either be because the significance of the fact was not reasonably apparent or because it was not apparent to him. Many who are brought before the

criminal courts are illiterate, ill-educated, suffering from one or another form of mental illness or of limited intellectual ability. A person who has been wrongly convicted should not be penalised should this be attributable to any of these matters. It is for those reasons that I would adopt the same interpretation of "newly discovered fact" as the Irish legislature.

Conclusions

64. It has always been common ground that Mr Adams' case falls into category 3. The newly discovered facts (as I would hold them to be) in his case do not show that a miscarriage of justice has occurred within the meaning that I would give to that phrase in section 133. Accordingly, I would dismiss his appeal.

65. The newly discovered facts in the case of Mr McCartney and Mr MacDermott, as described by Lord Kerr, so undermine the evidence against them that no conviction could possibly be based upon it. There can be no reasonable doubt of this. Accordingly I would allow their appeal and hold that they are entitled to compensation pursuant to the provisions of section 133.

LORD HOPE

66. I accept with gratitude Lord Phillips' description of the facts in the case of Andrew Adams and Lord Kerr's description of the facts in the cases of Eamonn MacDermott and Raymond McCartney. With that advantage I can go straight to the issues of principle that these cases have raised.

67. Mention should also be made of Barry George, who was granted permission to intervene in this appeal. On 2 July 2001 he was convicted of the murder on 26 April 1999 of the television presenter Jill Dando, who was killed by a single shot to the head as she was about to enter her home in Fulham. His appeal against conviction was dismissed on 29 July 2002: [2002] EWCA Crim 1923. A major part of the Crown's case against him was that a single particle of firearms discharge, which matched particles found in the cartridge case of the bullet which killed Miss Dando, in her coat and in samples of her hair, had been found nearly 12 months later in the pocket of a coat owned and worn by Mr George.

68. Following a review of his case, the Criminal Cases Review Commission decided to refer his conviction to the Court of Appeal under section 9 of the Criminal Appeal Act 1995 on the ground that new evidence called into question the evidence at the trial about the firearms discharge and the significance that had

apparently been attached to that evidence. New reports obtained from the Forensic Science Service had shown that it had no evidential value in the case against Mr George. On 15 November 2007 the Court of Appeal quashed the conviction and ordered a retrial: [2007] EWCA Crim 2722. The evidence of the firearms discharge was not admitted at the trial. On 1 August 2008 the jury by a unanimous verdict found Mr George not guilty. On the day of the acquittal the Crown Prosecution Service issued a press statement in which it was stated that Mr George now had the right to be regarded as an innocent man.

69. On 7 October 2009 Mr George applied for compensation under section 133 of the Criminal Justice Act 1988. By letter dated 15 January 2010 the Secretary of State for Justice told Mr George that he was not prepared to authorise an award of compensation as the new forensic evidence did not prove beyond reasonable doubt that he was innocent. He referred to the fact that in its judgment of 15 November 2007 the Court of Appeal stated that in the absence of the evidence of the firearms discharge there was circumstantial evidence capable of implicating Mr George, and that it had ordered a retrial which defence counsel conceded should take place. Mr George applied for judicial review of that decision on 14 April 2010. On 25 August 2010 Collins J granted permission. But he stayed the proceedings pending the decision of this Court as to the meaning of "miscarriage of justice" in section 133 of the 1988 Act.

70. Mr Glen QC for Mr George submitted that it was sufficient to entitle a person to an award of compensation under that section that his conviction had been reversed on the ground of a new or newly discovered fact and that, in the event of his being subjected to a retrial, he had been acquitted of the offence. As that was what had happened in his case it should be made clear by this Court in its judgment that, where a person had suffered punishment in such circumstances, compensation should be paid to him under the scheme that had been set up by the statute.

71. With that introduction I can go straight to the issues of principle that these cases have raised.

Background

72. The background to the introduction of a statutory right to compensation for miscarriages of justice by section 133 of the Criminal Justice Act 1988 was described in *In re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289, paras 6-9 by Lord Bingham of Cornhill and *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1, paras 25-28 by Lord Steyn. Lord Bingham drew attention in *McFarland*, para 6, to the underlying principles. In any

liberal democratic state there will be those who are accused of crime and are acquitted at trial, or whose convictions are reversed following an appeal. Those affected will have suffered the stigma of being accused and the trauma of standing trial and of imprisonment before the process is brought to an end. In principle it might seem that the state, which initiated the unsuccessful prosecution, should compensate those who have been acquitted, or at least some of them. How this was to be done and in what circumstances was much debated before the current system was adopted: see David Harris, "The Right to a Fair Trial in Criminal Proceedings as a Human Right" (1967) 16 ICLQ 352, 372-375. It was, as Lord Steyn said in *Mullen*, para 52, a process of evolution.

73. First, there was the adoption on 16 December 1966 of the International Covenant on Civil and Political Rights ("the ICCPR"), article 14(6) of which made provision for what it described as "compensation according to law" to a person whose conviction had been reversed or had been pardoned in the circumstances to which it referred and who had suffered punishment as a result of such a conviction. The ICCPR was ratified by the United Kingdom on 20 May 1976. On 29 July 1976 the Home Secretary (Mr Roy Jenkins) set out in a written answer the procedure which was being adopted for the making of ex gratia payments in recognition of the hardship caused by what he referred to as a "wrongful conviction": Hansard (HC Debates), WA cols 328-330. Three weeks later, on 20 August 1976, the ICCPR entered into force. Thereafter the United Kingdom continued to fulfil its international obligations under article 14(6) under the ex gratia scheme. The scheme was put onto a more formal basis on 29 November 1985: see Hansard (HC Debates), WA cols 689-690. The then Home Secretary (Mr Douglas Hurd) said that he would be prepared to pay compensation where this was required by the international obligations, and that he remained prepared to pay compensation to people who did not fall within the terms of article 14(6) but who had spent a period in custody following a wrongful conviction or charge, where he was satisfied that it had resulted from serious default on the part of a member of a police force or of some other public authority. He said that the Secretary of State for Northern Ireland intended to follow a similar practice. A similar scheme was already in operation in Scotland.

74. There was however international pressure on the United Kingdom to put its obligations under article 14(6) on a statutory footing: see *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1, para 28 by Lord Steyn. The response to it was section 133 of the Criminal Justice Act 1988. The new statutory right superseded in part the existing scheme for ex gratia payments, which remained in being until April 2006, when it was terminated both in England and Wales and Northern Ireland. This has had the inevitable, but unfortunate, consequence that claimants in those jurisdictions are now dependent solely upon the scheme provided by the statute. The ex gratia scheme which has been operated in Scotland by the Scottish Ministers still remains in force there, alongside the

system for the payment of compensation in respect of all reversals of convictions that fall within section 133 of the 1988 Act. This enables those against whom criminal proceedings were taken which can properly be regarded with hindsight as wrongful to be compensated even though their cases cannot be brought within the terms of the statute.

75. The way the scheme is currently operated in England and Wales was set out by the Minister of State (Lord McNally) in a written answer which was published on 1 March 2011 (Hansard (HL Debates), WA col 318), in which he said:

> "Compensation is paid under [section 133] where a conviction is quashed following an out of time appeal or following a reference by the Criminal Cases Review Commission to the relevant appeal court on the basis that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. Section 133 fully meets our international obligations. The Government do not operate a compensation scheme for those who have convictions quashed at in-time appeals or those who are acquitted at trial."

Figures disclosed by the Ministry of Justice about the number of applications received and the number of applications approved in England and Wales show that there has been a very substantial drop in the number of applications approved since the abolition of the ex gratia scheme in 2006. The system prior to that date was that all applications were considered first under section 133 and then, if not approved, were considered under the ex gratia scheme. The following table shows all applications for compensation received since May 2004 and those which were approved under section 133 :

Year	Total Applications Received	Applications Approved Under s 133
2004-05	88	39
2005-06	74	21
2006-07	39	23
2007-08	40	7
2008-09	38	7
2009-10	37	1

The statutory scheme

76. Article 14(6) of the ICCPR provides:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or

> he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

77. The wording of section 133(1) of the 1988 Act follows that of article 14(6). It provides:

> "(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation 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."

Subsection (2) provides that no payment of compensation is to be made unless an application for compensation is made to the Secretary of State, for which a time limit of two years beginning with the date when the person's conviction is reversed or he is pardoned was introduced in relation to England and Wales and Northern Ireland by section 61(3) of the Criminal Justice and Immigration Act 2008.

78. Section 133(5) of the 1988 Act, as amended by paragraph 16(4) of Schedule 2 to the Criminal Appeal Act 1995, provides:

> "In this section 'reversed' shall be construed as referring to a conviction having been quashed or set aside –
>
> (a) on an appeal out of time; or
>
> (b) on a reference –
>
> (i) under the Criminal Appeal Act 1995; or
>
> (ii) under section 194B of the Criminal Procedure (Scotland) Act 1995."

Subsection (5A), which was inserted in relation to England and Wales and Northern Ireland by section 61(5) of the Criminal Justice and Immigration Act 2008, provides:

> "(5A) But in a case where –
>
> (a) a person's conviction for an offence is quashed on an appeal out of time, and
>
> (b) the person is to be subject to a retrial,
>
> the conviction is not to be treated for the purposes of this section as 'reversed' unless and until the person is acquitted of all offences at the retrial or the prosecution indicates that it has decided not to proceed with the retrial."

79. To be entitled to compensation under section 133(1) the claimant must show that he has been convicted of a criminal offence and that subsequently his conviction has been reversed on an appeal out of time or on a reference by the CCRC, 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 words that I have quoted from the subsection differ from the equivalent part of article 14(6) of the ICCPR in one respect only. The statute uses the phrase "beyond reasonable doubt" where article 14(6) uses the word "conclusively."

80. One might have thought at first sight that, when applications for compensation were made to the Secretary of State, such simple wording could be applied to each case without much difficulty. But that has proved not to be the case, as can be seen from the speeches in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, where the meaning of the words "miscarriage of justice" was under scrutiny. Lord Bingham said that he would hesitate to accept the submission of the Secretary of State that section 133 obliged him to pay compensation only when a defendant, finally acquitted in the circumstances satisfying the statutory conditions, is shown beyond reasonable doubt to be innocent of the crime of which he had been convicted: para 9. Lord Steyn, on the other hand, said that the words "miscarriage of justice" extend only to cases where the person concerned is acknowledged to be clearly innocent: para 56.

81. Then there are the words "new or newly discovered fact". What is a "fact" for this purpose? And to whom does it have to be "new" or by whom does it have to be "newly discovered"? The meaning of those words is in issue in the appeal by Adams, whose conviction was reversed because of a failure by his representatives to make themselves aware of and make use of three pieces of important material at his trial which had been made available to them by the prosecution but of which Adams himself was not aware. The issue as to what is meant by the words

"miscarriage of justice" is common to his appeal and the appeals of MacDermott and McCartney. It will be convenient to examine this issue first.

"Miscarriage of justice"

82. Attempts have been made in subsequent cases to reconcile the differing views as to the meaning of "miscarriage of justice" that were expressed in *Mullen*: see *R (Murphy) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin), [2005] 1 WLR 3516; *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin); *In re Boyle's Application* [2008] NICA 35; *R (Allen) (formerly Harris) v Secretary of State for Justice* [2008] EWCA Civ 808, [2009] 2 All ER 1; *R (Siddall) v Secretary of State for Justice* [2009] EWHC 482 (Admin). In the Court of Appeal in Adams's case Dyson LJ said that, like Lord Phillips of Worth Matravers CJ in *Clibery's* case and Richards J in *Murphy*, he did not propose to express a view as to whether Lord Bingham's interpretation was to be preferred to that of Lord Steyn: *R (Adams) v Secretary of State for the Home Department* [2009] EWCA Civ 1291, [2010] QB 460, para 42. The assumption has been that Lord Bingham's reference in para 4 of his speech in *Mullen* to something having gone "seriously wrong in the investigation of the offence or the conduct of the trial" could be taken as a test of whether the right to compensation under section 133 was available that could sit alongside that preferred by Lord Steyn. In *Allen*, para 26 Hughes LJ said that this was made the plainer by Lord Bingham's references to a defendant who "should clearly not have been convicted" in para 4 and who "certainly should not have been convicted" in para 9(1).

83. Dyson LJ set the scene for a discussion of this issue in these appeals in para 19 of his judgment in *R (Adams) v Secretary of State for the Home Department* [2009] EWCA Civ 1291, [2010] QB 460, when he said:

> "The question what is meant by 'miscarriage of justice' has not been resolved by the courts. As Toulson LJ said when giving permission to appeal in the present case, there are at least three classes of case where the Court of Appeal allows an appeal against conviction on the basis of fresh evidence. I shall call them 'category 1', 'category 2' and 'category 3' cases. A category 1 case is where the court is sure that the defendant is innocent of the crime of which he has been convicted. An obvious example is where DNA evidence, not obtainable at the trial, shows beyond reasonable doubt that the defendant was not guilty of the offence. A category 2 case is where the fresh evidence shows that he was wrongly convicted in the sense that, had the fresh evidence been available, no reasonable jury could properly have convicted. An example is where the prosecution case

> rested entirely on the evidence of a witness who was put forward as a witness of truth and fresh evidence undermines the creditworthiness of that witness, so that no fair minded jury could properly have convicted on the evidence of that witness. It does not follow in a category 2 case that the defendant was innocent. A category 3 case is where the fresh evidence is such that the conviction cannot be regarded as safe, but the court cannot say that no fair-minded jury could properly convict if there were to be a trial which included the fresh evidence. The court concludes that a fair-minded jury might convict or it might acquit. There is a fourth category of case to which Lord Bingham referred in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1. This is where a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

84. This list of the different types of case where appeals are allowed according to the practice of the Court of Appeal (Criminal Division) was used in argument to focus the positions adopted by either side in these appeals. It was assisted later in the judgment by an acknowledgment that there were two limbs to Lord Bingham's interpretation as set out in his speech in *Mullen*, para 4: [2010] QB 460, para 43. The first limb was where the person was innocent of the crime of which he had been convicted: category 1 according to Toulson LJ's analysis. The second limb was where something had gone seriously wrong in the investigation or the conduct of the trial and the person should clearly not have been convicted. For the Secretaries of State it was submitted that only cases falling within category 1 would satisfy the requirements of section 133(1). For Adams Mr Owen QC submitted that it was not possible to draw a clear line between categories 2 and 3, so it was sufficient for him to bring his case within category 3. In any event, he submitted that Lord Bingham's interpretation of the phrase in his second limb in *Mullen* was to be preferred, that proof of innocence was not required and that his case came within category 4. Counsel for the appellants McCartney and MacDermott submitted that Lord Bingham's interpretation was to be preferred, and that their cases too fell within his second limb and category 4.

85. It would be wrong to regard the way these categories were identified and described by the Court of Appeal as a substitute for looking at the language of section 133(1) itself and reaching our own view as to its effect. Lord Bingham said in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, para 2 that he would allow the Secretary of State's appeal on a narrow ground which made it unnecessary for him to reach a concluded view as to whether the right to compensation under the statute was available only to those who were innocent of the crime of which they had been convicted. We do not have that luxury in the

cases that are before us in these appeals. A choice has to be made. It is time to take a fresh look at the arguments.

86. Our task is made less onerous, although no less difficult, by the fact that the materials that were said to be relevant were discussed so fully by Lord Bingham and Lord Steyn in *Mullen*. It is striking how little assistance they were able to derive from the materials that were before the House. On many points both Lord Steyn and Lord Bingham were in agreement. They were agreed that the wording of section 133(1) was intended, as Lord Bingham put it in para 9, to reflect article 14(6). In para 5 he said that the parties were rightly agreed that the key to interpretation of section 133 was a correct understanding of article 14(6). They were also agreed that, as Lord Bingham said in para 9(1), the expression "miscarriage of justice" is not a legal term of art. Taken on its own and out of context, it has no settled meaning. Lord Steyn said that the expression had to be looked at in the relevant international context, and that the only relevant context here was the international meaning of the words in article 14(6) on which section 133 is based: para 36. The question then was, what did the materials reveal as to its international meaning?

87. The travaux préparatoires disclosed no consensus of opinion on the meaning to be given to it. Lord Steyn said that they were neutral and did not assist in any way on the proper construction of article 14(6): para 54. Lord Bingham seems to have seen this as a possible pointer towards a more generous interpretation. He said that the expression "miscarriage of justice" may have commended itself because of the latitude of interpretation that it offered: para 9(2). But this was no more than a straw in the wind. The jurisprudence of the United Nations Human Rights Committee was of little assistance either – indeed, Lord Steyn does not mention it at all. And there was no consensus of academic opinion on the issue.

88. In this situation Lord Steyn resorted first to an examination of article 14(6) on its own terms: para 45. Lord Bingham did not undertake this exercise. Instead he took as his starting point the statements that Mr Jenkins and Mr Hurd made when they were explaining the ex gratia scheme to Parliament: para 4. As he said at the outset of this paragraph, they were addressing the subject of wrongful convictions and charges. He observed that, like the expression "miscarriage of justice", the expression "wrongful convictions" is not a legal term of art and it has no settled meaning. He then set out to describe in some detail the situations to which "in ordinary parlance", as he put it, the expression would be taken to extend. Here we find the first and second limbs, as Dyson LJ in the Court of Appeal described them at [2010] QB 460, para 43, set out. The first is the conviction of those who are innocent of the crime of which they were convicted. The second embraces cases where those who, whether guilty or not, should not have been convicted. The manifold reasons where this might happen were impossible and

unnecessary to identify. The common factor however was that something had gone seriously wrong in the investigation of the offence or the conduct of the trial.

89. It is important not to lose sight of the fact that Lord Bingham was *not* seeking in para 4 to describe what, in the context of article 14(6), was meant by the expression "miscarriage of justice". He was concentrating here on the expression "wrongful conviction" in the statements about the ex gratia scheme. He did not refer to the fact that it is a precondition of the right to compensation under article 14(6), and in its turn section 133, that the conviction was reversed because of a new or newly discovered fact. The descriptions of the ex gratia scheme did not mention this as a prerequisite. Quite what part this discussion had to play in the interpretation of article 14(6), to which he turned in para 5, is unclear. He took account of the fact that in the course of his statement Mr Hurd recited the terms of, and undertook to observe, article 14(6): para 5. There is an indication in that paragraph that he saw the only difference between that part of Mr Hurd's statement and the enactment of section 133 as being that the right to be compensated should more obviously be, as article 14(6) requires, "according to law". But, as he said at the end of that paragraph, the task of the House was to interpret section 133. He did not say – and it would have been surprising if he had done – that the key to this was to be found in Mr Hurd's description of the cases where he was willing to pay compensation for a "wrongful conviction" under the ex gratia scheme. When he said at the end of para 8 that 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, he was not offering a considered view as to what those provisions actually mean. He was explaining why, because there was no failure in the trial process, he could decide the case against Mullen on that limited ground without forming a concluded view as to what the convicted person had to show to be entitled to compensation.

90. In *R (Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin), para 25, Lord Phillips of Worth Matravers CJ said that in para 4 of his speech in *Mullen* Lord Bingham considered two different situations, each of which he (that is, Lord Bingham) considered fell within the description of "miscarriage of justice" in section 133 of the 1988 Act. It is true, as Lord Phillips went on to point out, that in para 6 of his speech Lord Bingham referred to the core right with which article 14(6) is concerned as the right to a fair trial. But I think, with respect, that Lord Phillips was wrong to say that in para 4 of his speech Lord Bingham was considering what was meant by "miscarriage of justice" in section 133, as he himself has accepted: see para 30, above. Hughes LJ drew attention to this point in *R (Allen) (formerly Harris) v Secretary of State for Justice* [2009] 2 All ER 1, para 25. He said that it must be remembered that in *Mullen* both the statutory and the ex gratia schemes were under consideration. In my opinion the value of Lord Bingham's speech in *Mullen* lies not in any attempt on his part to subject section 133 to textual analysis, for he did not do this. It is to be found in the

reasons he gave for hesitating to accept the argument for the Secretary of State that section 133 was satisfied only when the defendant was shown beyond reasonable doubt to have been innocent of the crime of which he had been convicted, and in particular in the three points on which he disagreed with Lord Steyn.

91. Lord Steyn's textual analysis of article 14(6) begins with a warning that there was no overarching purpose of compensating all who are wrongly convicted. For the reasons he gives in para 45, the fundamental right under article 14(6) is narrowly circumscribed. There was no intention to compensate all those whose convictions were quashed within the ordinary time limits, only those whose convictions were quashed on appeal out of time. And this was only where a new or newly discovered fact showed conclusively that there had been a miscarriage of justice. Having made this point, he then concentrated in para 46 on 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. He said that this filtered out cases of two kinds, (1) where there may have been a wrongful conviction and (2) where it is only probable that there may have been a wrongful conviction. He concluded that the only relevant context pointed to a narrow interpretation, that is to say the case where innocence is demonstrated.

92. This approach leans very heavily on the use of the word "conclusively". That word certainly points towards a narrow interpretation. But it does not point inevitably to the demonstration of innocence as the only case that could qualify for compensation under the article. The fact that a person who has been pardoned is brought within the scheme does not have that effect either. It would plainly have been wrong to exclude those who are pardoned from the scheme when those whose convictions have been reversed are given the benefit of it. But the reversal of a conviction and a pardon are processes which are distinct from each other. It does not follow from the mere fact that they are both covered by the same scheme that the only reversals of convictions that can be contemplated are those which would otherwise have deserved a pardon. Lord Steyn might have examined these points more fully, had he not been persuaded by two considerations to which he then turned that he had found the right answer.

93. The first was the use of the words "une erreur judiciaire" in the French text of the ICCPR. In para 47 of his speech in *Mullen* Lord Steyn said that this was a technical expression indicating a miscarriage of justice in the sense of the conviction of the innocent. In para 9(4) of his speech Lord Bingham expressed some unease about this, as he contrasted these words with the reference to "un condamné reconnu innocent" in article 626 of the French Code de Procédure Pénale. He said that the expression "une erreur judiciaire" could be understood as equivalent to "miscarriage of justice" in its broad sense, and that it was not obviously apt to denote proof of innocence. In *In re Boyle's Application* [2008]

NICA 35, para 11 Girvan LJ said that he considered that Lord Bingham's hesitation in not accepting Lord Steyn's stringent requirement of proof of innocence was justified. In para 12 he pointed out that the term "erreur judiciaire" is defined by Gérard Cornu in his *Vocabulaire Juridique*, 7th ed (1998), as "une erreur de fait commise par une juridiction de jugement dans son appreciation de la culpabilité d'une personne poursuivie". In para 13 he enlarged on Lord Bingham's reference to article 626 of the Code de Procédure Pénale, pointing out that it did not require proof of innocence but rather that, where a defendant's conviction is quashed and he is subsequently acquitted, he is "reconnu innocent" in consequence – in other words, the annulment of the conviction *itself* leads to the establishment of his innocence. Although Mr Tam QC for the Secretary of State sought to defend Lord Steyn's interpretation in his written case, he accepted in the course of Mr Owen's oral argument that it was probably incorrect. For my part, I think that Girvan LJ's researches have shown that Lord Steyn's understanding of the words "une erreur judiciaire" in the French text of article 14(6), for which he gave no authority, was mistaken.

94. The second consideration on which Lord Steyn relied was an observation in para 25 of an explanatory report by the Steering Committee for Human Rights appointed by the Council of Europe which accompanied the Seventh Protocol of the European Convention when it was published in November 1984: *Mullen*, para 48. It said of article 3, which follows the wording of article 14(6) of the ICCPR, that the intention was that states would be obliged to compensate persons "only in clear cases of miscarriage of justice, in the sense that there would be an acknowledgment that the person concerned was clearly innocent." Having noted that in the introduction to the report it was stated that participation in the Protocol would not affect the application of provisions containing obligations under any other international instrument, Lord Steyn said that the explanatory report nevertheless had great persuasive value in the process of interpretation. In para 9(4), on the other hand, Lord Bingham set out five reasons for thinking that this passage does not bear the weight that Lord Steyn attached to it. Among those reasons are two which seem to me to be particularly significant. First, many more states are parties to the ICCPR than to the European Convention or the Seventh Protocol, which the United Kingdom has not signed or ratified. Second, para 25 does not appear to be altogether consistent with para 23, which suggests that a miscarriage of justice occurs where there is a serious failure in the judicial process involving grave prejudice to the convicted person. Furthermore, as Lord Bingham noted in para 9(5), van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed (1998), p 689 take a different view, suggesting that the explanatory report's interpretation is too strict and that reversal of the conviction on the ground that new facts have been discovered which introduce a reasonable doubt as to the guilt of the accused is enough. Lord Steyn said in para 48 that the explanatory report had great persuasive value. I think that, for the reasons Lord Bingham gives, this overstates the position. The better view is

that it lends some support the Secretary of State's argument, but that it must be for the court to work out for itself what the words mean.

95. There was one further difficulty about Lord Steyn's interpretation to which Lord Bingham drew attention in para 9(6). This is that courts of appeal, although well used to deciding whether convictions are safe or whether reasonable doubts exist about their safety, are not called upon to decide whether a defendant is innocent and in practice rarely do so. In *R (Allen) (formerly Harris) v Secretary of State for Justice* [2009] 2 All ER 1, para 40(iii) Hughes LJ said that cases where the innocence of the convicted defendant is genuinely demonstrated beyond reasonable doubt by the new or newly discovered fact will be identifiable in that court and the judgment will, in virtually every case, make this plain. I do not think that this entirely meets Lord Bingham's point. I have no doubt that there will be cases of the kind that Hughes LJ describes. But it remains true that courts of appeal are not called upon to say whether or not a defendant was innocent, and it is at least questionable whether restricting the right to compensation to cases where the establishment of innocence is apparent from the court's judgment imposes too severe a test for the entitlement to compensation.

A fresh analysis

96. If one accepts, as I would do, Lord Bingham's reasons for doubting whether Lord Steyn was right to find support for his reading of article 14(6) in the French text and in para 25 of the explanatory committee's report on article 3 of the Seventh Protocol, one is driven back to the language of the article itself as to what the words "miscarriage of justice" mean. Taken by itself this phrase can have a wide meaning. It is the sole ground on which convictions can be brought under review of the High Court of Justiciary in Scotland: Criminal Procedure (Scotland) Act 1995, section 106(3). But the fact that these words are linked to what is shown "conclusively" by a new or newly discovered fact clearly excludes cases where there *may* have been a wrongful conviction and the court is persuaded on this ground only that it is unsafe. It clearly includes cases where the innocence of the defendant is clearly demonstrated. But the article 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 (see para 55 above) 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. Watson and Crick published their discovery of the double helix in 1951, but DNA profiling was not developed until 1984 and it was not until 1988 that it was used to convict Colin Pitchfork and to clear the prime suspect in the Enderby Murders case. 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.

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

99. For these reasons it is plain that category 1 in Dyson LJ's list (see para 83, above) falls within the scope of section 133. I think that it is equally plain that category 4 (Lord Bingham's second limb) does not, as it is taken from para 4 of Lord Bingham's speech in *Mullen* where he was discussing what was included within the phrase "wrongful convictions", not what was meant by section 133. This leaves category 2, where the "fresh evidence" shows that the defendant was wrongly convicted in the sense that, had the fresh evidence been available, no reasonable jury could properly have convicted; and category 3, where the "fresh evidence" is such that the conviction cannot be regarded as safe, but the court cannot say that no fair-minded jury could properly convict if there were to be a trial which included the fresh evidence. Bearing in mind that we must form our own view as to what section 133 means, can the wording of that section on a correct understanding of article 14(6) include either or both of these categories?

100. I have put the words "fresh evidence", which of course echo the wording of section 23 of the Criminal Appeal Act 1968 (see also section 106(3) of the Criminal Procedure (Scotland) Act 1995), into inverted commas because they depart from the words of section 133. The statute, like article 14(6), refers to a new, or newly discovered "fact", not to fresh evidence. And it must be a fact which shows beyond reasonable doubt, or "conclusively", that there was a miscarriage of justice. Fresh evidence does not attain that status until the matter to which it relates has been proved or has been admitted to be true. Fresh evidence that justifies the conclusion referred to in category 3 will usually not be, and certainly need not be, of that character. If it shows that the conviction is merely unsafe, the court may order a retrial. Under our system of trial by jury there will be no way of knowing, beyond reasonable doubt, whether it was a new or newly discovered fact that led to the acquittal. For these reasons I would exclude category 3 from the scope of section 133.

101. This leaves category 2. As Hughes LJ indicates in *R (Allen) (formerly Harris) v Secretary of State for Justice* [2009] 2 All ER 1, para 40(iii), we are dealing here with a new or newly discovered fact that is identifiable as such by the Court of Appeal. Category 2, as described in Dyson LJ's list, is of course accurate as a description of what happens according to the Court of Appeal's practice. But it is too broadly framed for use as a reliable guide to what falls within the scope of section 133 read with article 14(6). It lacks the limiting factors indicated by the words "new or newly discovered *fact*" and "shows *conclusively*". It may not be easy in practice to distinguish cases that fall within it from those that fall within category 3. So in my opinion a more precise, and more exacting, formula must be found. I am uneasy too about requiring the Secretary of State, whose function it is to administer the scheme under the statute, to apply a test which refers to what a reasonable jury would do. This is a judgment that is best left to the courts. While he will be guided by what the appellate court said when it reversed the conviction, he is entitled to look at the new or newly discovered fact for himself and draw his own conclusions as to its consequences so long as they are not in conflict with what the court has said in its judgment.

102. This brings me back to what I said in para 94 above. For the reasons I give there I would rephrase category 2, so that it fits with the narrowly circumscribed language of article 14(6) and section 133. I would limit it to cases where the new or newly discovered fact shows conclusively that there was a miscarriage of justice because the evidence that was used to obtain the conviction was so undermined by the new or newly discovered fact that no conviction could possibly be based upon it. This would include cases where the prosecution depended on a confession statement which was later shown by a new or newly discovered fact to have been inadmissible because, as the defendant had maintained all along, it was extracted from him by improper means. It may be quite impossible to say in such a case that he was, beyond reasonable doubt, innocent. But, as the evidence against him has

been completely undermined, it can be said that it has been shown beyond reasonable doubt, or "conclusively", that there has been a miscarriage of justice in his case which was as great as it would have been if he had in fact been innocent, because in neither case should he have been prosecuted at all.

Retrial

103. Section 133(5A), which was inserted by section 61 of the Criminal Justice and Immigration Act 2008, changed the timetable as to when a person's conviction was to be taken to have been reversed in a case where a retrial is ordered. This amendment has to be read with the amendment which was made at the same time to section 133(2) by inserting a time limit for making an application for compensation under section 133. This is a period of two years beginning with the date when the conviction is reversed. Section 133(5A) provides that where the person is to be subject to a new trial the conviction is not to be treated as reversed unless and until the person is acquitted of all offences at the retrial or the prosecution indicates that it has decided not to proceed with the retrial.

104. This provision introduces a feature of the statutory scheme which was not before the House in *Mullen*. But I do not think that it affects Lord Steyn's interpretation of section 133, or the qualification which I would make to it to include cases where the prosecution should never have been brought. It is not to be taken as suggesting that compensation is payable in every case where the appellate court has ordered a new trial because it is satisfied that the conviction was unsafe in the light of fresh evidence. What it does, as it seems to me, is to allow for the possibility that something may emerge either before or during the retrial which would require compensation to be paid. Nor is it to be taken as suggesting that compensation is payable in every case, such as that of Mr George, where the person was acquitted at his retrial. The tests laid down in section 133(1) must still be applied. It is only where a new fact or a newly discovered fact shows conclusively that the person was innocent or that the prosecution should never have been brought that there will be a right to compensation. This will not be the case where a retrial has been ordered, and it may not be apparent from the jury's verdict at the retrial. The fact that it returned a verdict of not guilty will not be enough. But if new facts emerge during the retrial process that have the effect of showing conclusively that the person was innocent or that the prosecution should never have been brought they can be taken into account, even though they emerged after the date when the conviction was reversed by the Court of Appeal.

New or newly discovered fact

105. A question that is raised in Adams's case is to whom these words are addressed. His appeal was allowed by the Court of Appeal on the basis that, owing to inadequacies in the conduct of his case by his then legal team, there had been a failure by them to discover and make use at the trial of three pieces of important material which had been made available to them by the prosecution but of which Adams himself was not aware: [2007] 1 Cr App R 449, para 155. In other words, this was material that was available at the trial but not used. Could it be said that these were new or newly discovered facts? His case is that all he needed to show was that he himself was unaware of them. They were new to him because they were not revealed to him by his legal team. They did not have to be new, as the Secretary of State maintains, to everyone involved in the trial.

106. The Divisional Court (Maurice Kay LJ and Simon J) held that the Secretary of State was right to reject Adams's claim for compensation on the ground that his conviction was not quashed because of a new or newly discovered fact: [2009] EWHC 156 (Admin). The Court of Appeal (Waller, Dyson and Lloyd LJJ) disagreed, for three reasons: [2010] QB 460, paras 14-16. First, it was difficult to accept that those who drafted the article intended to deny compensation to a person whose conviction was reversed on the basis of material which was available to his legal team and would have shown that he was innocent. Second, there was no need to interpret the phrase in a way that yielded such an extreme result. Third, the focus of the language was on the convicted person. There was no mention of his legal representatives in the article. So compensation was not to be denied to him if facts emerged that were new to him, although they were known to his legal representatives.

107. I do not think that the language of article 14(6) bears this interpretation. It seems to me that the focus of attention is on what was known or not known to the trial court, not to the convicted person. The assumption is that the trial court did not take the fact into account because it was not known or had not been discovered at the time of the trial. If this was attributable wholly or in part to the convicted person because he deliberately chose not to reveal what he knew to his defence team compensation must be denied to him, as the coda to article 14(6) makes clear. But, leaving that point out of account, the only relevant questions are whether it was not available to the trial court because it was not known then at all or whether, although knowable, it had not been discovered by the time of the trial. Material that has been disclosed to the defence by the time of the trial cannot be said to be new or to have been newly discovered when it is taken into account at the stage of the out of time appeal. To focus on the state of mind of the convicted person goes too far. It ignores the fact that in practice the defendant's legal representatives are unlikely to have discussed with him every piece of information that they come across in the course of their preparation for and conduct of the trial. I agree with

Lord Judge that a fact is not new or newly discovered for the purposes of section 133 just because the defendant himself, who was previously unaware of that fact, ceases to be ignorant of it.

Does denial of compensation infringe the presumption of innocence?

108. Mr Owen submitted that a narrow interpretation of article 14(6) would conflict with the presumption of innocence in article 6(2) of the European Convention. He relied on a series of decisions by the European Court of Human Rights which show that the presumption of innocence may be violated in particular circumstances where, following an acquittal, a court or other authority expresses an opinion of continuing suspicion which amounts in substance to a determination of guilt of the person concerned: *Sekanina v Austria* (1993) 17 EHRR 221; *Leutscher v The Netherlands* (1996) 24 EHRR 181; *Rushiti v Austria* (2000) 33 EHRR 1331; *Weixelbraun v Austria* (2001) 36 EHRR 799; *Orr v Norway* (Application No 31283/04) (unreported) 15 May 2008; and *Hammern v Norway* (Application No 30287/96) (unreported) 11 February 2003. These cases, other than *Orr v Norway*, were examined in *Mullen* by Lord Bingham in para 10 and by Lord Steyn in paras 41-44. Mr Owen said that the reasons that Lord Steyn gave for finding these cases of no assistance on the question as to whether article 6(2) requires an expansive interpretation of article 3 of the Seventh Protocol or of article 14(6) of the ICCPR were correct but irrelevant. Lord Bingham on the other hand said in para 10 that they were of no assistance, since Mullen's acquittal was based on matters entirely unrelated to the merits of the accusation against him. So it was open to this court to take a fresh look at the issue.

109. As Mr Tam for the Secretary of State pointed out, article 6(2) applies according to its own terms to the criminal process. The Strasbourg cases show that its jurisprudence is designed to protect the criminal acquittal in proceedings that are closely linked to the criminal process itself. In *Sekanina v Austria* (1993) 17 EHRR 221, para 30, for example, the court said that the voicing of suspicions regarding a person's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits but that it was no longer admissible to rely on such suspicions once an acquittal has become final. That was a case where the applicant had been charged with murder and remanded in custody but was subsequently acquitted at his trial. His claim for compensation was dismissed on the ground that there were still strong suspicions regarding his guilt. The problem was that Austrian legislation and practice linked 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 seen to be regarded as a consequence and, to some extent, the concomitant of the decision on the former: para 22. The court was careful to point out in para 25, however, that the situation in that case was not comparable to that governed by article 3 of the Seventh Protocol. This distinction shows that a person might properly be refused

compensation under that article, and thus under article 14(6) of the ICCPR which marches together with article 3 of the Seventh Protocol, without violating the presumption of innocence under article 6(2).

110. The same approach was taken in *Hammern v Norway* (Application No 30287/96) 11 February 2003 where the conditions for obtaining compensation were linked to the issue of criminal responsibility in such a manner, by the same court sitting largely in the same formation, so as to bring the proceedings within the scope of article 6(2): para 46. A further example of this line of reasoning is provided by *Y v Norway* (2003) 41 EHRR 87, where the applicant was acquitted by the High Court which then went on to refuse his claim for compensation the next day on the ground that it was clearly probable that he had committed the offences with which he had been charged. So too in *Orr v Norway* (Application No 31283/04) 15 May 2008, where the High Court dealt with the acquittal and the payment of compensation to the complainant in two clearly distinct parts of its judgment, but in several places highlighted that the standard of proof for civil liability to pay compensation was less strict than for criminal liability: para 52. This was held in para 53 to cast doubt on the correctness of the acquittal.

111. The principle that is applied is that it is not open to the state to undermine the effect of the acquittal. What article 14(6) does not do is forbid comments on the underlying facts of the case in subsequent proceedings of a different kind, such as a civil claim of damages, when it is necessary to find out what happened. The system that article 14(6) of the ICCPR provides does not cross the forbidden boundary. The procedure laid down in section 133 provides for a decision to be taken by the executive on the question of entitlement to compensation which is entirely separate from the proceedings in the criminal courts. As Lord Steyn pointed out in *Mullen*, paras 41-43, in none of the cases from Austria or Norway, nor in *Leutscher v The Netherlands* 24 EHRR 181, was the court called upon to consider the interaction between article 6(2) and article 3 of the Seventh Protocol. On the contrary, the fact that the court was careful to emphasise in *Sekanina v Austria*, para 25 that the situation in that case was not comparable to that governed by article 3 of the Seventh Protocol is an important pointer to the conclusion that, as Lord Steyn put it in *Mullen*, para 44, article 14(6) and section 133 of the 1988 Act are in the category of lex specialis and that the general provision for a presumption of innocence does not have any impact on them. A refusal of compensation under section 133 on the basis that the innocence of the convicted person has not been clearly demonstrated, or that it has not been shown that the proceedings should not have been brought at all, does not have the effect of undermining the acquittal.

Conclusions

112. I would dismiss the appeal by Adams on the ground that the phrase "new or newly discovered fact" does not encompass the material that was available to but not used at the trial by the convicted person's legal representatives. But I would add that the second limb of the test that has been attributed to Lord Bingham because of what he said in para 4 of his speech in *Mullen*, on which Mr Owen relied, does not meet the requirements of article 14(6). So, even if the material in question could be said to have been newly discovered, his case would not have entitled him to compensation under the statute.

113. I would allow the appeals by McCartney and MacDermott, for the reasons given by Lord Kerr. It is not possible to say in their cases that the newly discovered facts show conclusively that they were innocent of the crimes of which they were convicted. But it is possible to say, in the light of the newly discovered facts, that these were proceedings that ought not to have been brought because the evidence against them has been so completely undermined that no conviction could possibly be based upon it. I would hold that their cases fall within the narrowly circumscribed language of article 14(6) and section 133 of the 1988 Act, and they are entitled to be compensated.

LADY HALE

114. I agree that a "miscarriage of justice" in section 133 of the Criminal Justice Act 1988 (see para 1 above) should be interpreted as proposed by Lord Phillips in para 55 of his judgment. The phrase is clearly capable of bearing a wider meaning than conclusive proof of innocence. Both the inspiration for section 133, in article 14(6) of the ICCPR (see para 6 above) and the meaning of "miscarriage of justice" in domestic law in 1988 support a wider meaning. The drafters of article 14(6) rejected all attempts to confine it to proof of innocence. In 1988, the Criminal Appeal Act 1968 permitted the Court of Appeal to dismiss an appeal if they considered that "no miscarriage of justice has actually occurred" (section 2(1) before its amendment by the Criminal Appeal Act 1995). This points strongly to the meaning of "miscarriage of justice" as the conviction of someone who ought not to have been convicted. The addition in section 133 of the requirement that this be shown "beyond reasonable doubt" (in substitution for "conclusively" in article 14(6)) indicates that this refers to someone who definitely should not have been convicted rather than to someone who might or might not have been convicted had we known then what we know now.

115. As I understand it, Lord Phillips' formulation, with which both Lord Hope and Lord Kerr agree, would limit the concept to a person who should not have been convicted because the evidence against him has been completely undermined. Unlike Lord Clarke, therefore, he would not include a person who should not have been convicted because the prosecution was an abuse of process. 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.

116. I do sympathise with Lord Brown's palpable sense of outrage that Lord Phillips' test may result in a few people who are in fact guilty receiving compensation. His approach would of course result in a few people who are in fact innocent receiving no compensation. I say "a few" because the numbers seeking compensation are in any event very small. But Lord Phillips' approach is the more consistent with the fundamental principles upon which our criminal law has been based for centuries. Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt. This is, as Viscount Sankey LC so famously put it in *Woolmington v Director of Public Prosecutions* [1935] AC 462, at p 481, the "golden thread" which is always to be seen "throughout the web of the English criminal law". Only then is the state entitled to punish him. Otherwise he is not guilty, irrespective of whether he is in fact innocent. If it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished. He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now.

117. Of course, it is not enough that the evidence supporting his conviction has been fatally undermined. This has to be because of a "new" or "newly discovered" fact. On this point, I also agree with Lord Phillips, who adopts the definition contained in section 9(6) of the Criminal Procedure Act 1993 in Ireland (see para 60). This means that the person convicted either did not know or did not appreciate the significance of the information in question. It seems difficult to make sense of the proviso to section 133(1) – "unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted" – in any other way.

118. For these reasons, in agreement with Lord Phillips, I would dismiss Mr Adams' appeal but allow the appeals of Mr MacDermott and Mr McCartney. The evidence against Mr Adams has not been so undermined that no conviction could possibly be based upon it, whereas Lord Kerr has demonstrated that this is indeed the case with Mr MacDermott and Mr McCartney.

LORD KERR

The appeals of Eamonn MacDermott and Raymond McCartney

Introduction

119. On 12 January 1979, after a trial by a judge, sitting without a jury at Belfast City Commission, Raymond Pius McCartney was convicted of two offences of murder and one of membership of the Irish Republican Army. The two murder victims were Geoffrey Agate and Detective Constable Liam Patrick McNulty. Mr McCartney was sentenced to life imprisonment on each of the murder counts and to five years' imprisonment for the offence of membership of a proscribed organisation. On the same date and at the same court Eamonn MacDermott was convicted of various offences including the murder of Detective Constable McNulty. He was sentenced to life imprisonment for that offence and to various terms of imprisonment for the other offences.

120. The sole evidence on which Mr McCartney and Mr MacDermott were convicted consisted of written and verbal admissions that they were said to have made during interviews by police. Both contested the admissibility of the statements, alleging that they had either been the product of ill treatment by interviewing police officers or that they had been concocted. The admissibility of the statements was considered by the trial judge after a long voire dire hearing. He rejected the allegations of the appellants and stated that he was satisfied that neither had been ill treated. The judge also considered whether to exercise his residual discretion to exclude the statements from evidence if he considered it proper to do so. He concluded that it would not be proper to do so and the statements were duly admitted.

121. An appeal by Mr MacDermott and Mr McCartney against their convictions was dismissed by the Court of Appeal in Northern Ireland (Jones LJ, Gibson LJ and Kelly J) on 29 September 1982. Both spent several years in prison. On 18 January 2006 the Criminal Cases Review Commission referred the convictions of Mr MacDermott and Mr McCartney to the Court of Appeal. On 15 February 2007 their convictions were quashed, the Court of Appeal declaring that they had "a distinct feeling of unease" about their safety.

122. Following the quashing of their convictions by the Court of Appeal, Mr McCartney and Mr MacDermott applied to the Secretary of State for Northern Ireland for compensation under section 133 of the Criminal Justice Act 1988 on the basis that they had been victims of a miscarriage of justice. The applications

were refused. They then sought judicial review of that decision. The application for judicial review was rejected by Weatherup J on 25 June 2009. An appeal against that decision was dismissed by the Court of Appeal in Northern Ireland (Morgan LCJ, Girvan LJ and Coghlin LJ) on 8 February 2010.

The appellants' trials

Mr McCartney

123. Mr McCartney's case on trial had been that he did not make any verbal admissions and that the two written statements attributed to him had been fabricated by police officers. He claimed that he had been ill-treated before each statement had been written out. He had refused to sign them but he had initialled the caution that appeared at the head of the first statement and had drawn a line and had written the words "end of statement" at the concluding part of the second statement. Mr McCartney claimed that his ill-treatment began during the second of a series of interviews that took place in Castlereagh Police Office between 3 and 7 February 1977. The ill-treatment continued during a number (although not all) of the succeeding interviews. Two police officers in particular were identified by him as having been the most persistent and determined perpetrators. He gave evidence that he had been told that they had been specially chosen in order to extract confessions from him. The suggestion was made by Mr McCartney's counsel that proper supervision of interviews had "broken down" and that a concerted campaign of abuse had been conducted in order to obtain confessions that would lead to convictions.

124. The interviewing police officers denied that they had been guilty of any form of ill-treatment. Superior officers rejected the suggestion that there had been any lack of supervision or that particular officers were chosen in order to extract confessions. It was accepted, however, that a "new team" of detectives had been selected to continue interviews with Mr McCartney on the second day of interviewing. This new team was chosen, according to one of the senior officers in charge of interviews, because Mr McCartney, despite having shown signs of co-operation on the first evening of interviews, had evinced a less co-operative attitude the following day. The detectives thus selected were those identified by Mr McCartney as his principal abusers.

125. During the course of Mr McCartney's trial, an application was made on his behalf for leave to call three witnesses who had been arrested at the same time as he and who had been interviewed at Castlereagh Police Office during the same period. In the event, two of the witnesses gave evidence. One of these was a man called John Thomas Pius Donnelly. He had been arrested at the same time as Mr

McCartney. He was interviewed about and subsequently charged with one of the murders of which Mr McCartney was later convicted. He was also charged with having caused an explosion. For reasons that will appear presently, the charges against Mr Donnelly were not proceeded with and he did not stand trial.

126. During the trial of Mr McCartney and Mr MacDermott, Mr Donnelly gave evidence that he had been subjected to serious assaults during his interviews and had sustained significant injuries in consequence. Although the detectives who, according to Mr Donnelly, had assaulted him, Detective Constable French and Detective Constable Newell, were not those who were alleged to have ill-treated Mr McCartney, they were members of the group of officers who had been conducting interviews into the murders of Mr Agate and Detective Constable McNulty. Detective Constable French had interviewed Mr MacDermott and had recorded the most significant statement of admission from him. Mr MacDermott alleged that he had been assaulted by Detective Constable French and by the officer who accompanied him, Detective Constable Dalton. This second detective had also interviewed Mr McCartney and Mr McCartney claimed to have been assaulted by him also.

127. On 6 February 1977, after he had been interviewed for several days, two doctors carried out a joint examination of Mr Donnelly. One of them was a forensic medical officer, retained by the police. No fewer than ten areas of injury on Mr Donnelly's body were recorded. Substantial bruising, particularly in the abdominal area was found. The trial judge observed that both doctors were "shocked and horrified" by what they found on examination.

128. How Mr Donnelly's injuries had been caused was the subject of acute controversy on trial. It was trenchantly put to him by counsel for the prosecution that some had been sustained during a series of struggles while he was being taken to and from interview rooms and that the remaining injuries were self inflicted. This was a highly significant cross examination when seen in the light of the subsequently discovered reasons that the charges against Mr Donnelly had not been proceeded with. The decision not to proceed with the prosecution of Mr Donnelly was itself highly significant for he was alleged to have made verbal and written admissions of murder and causing an explosion.

129. The second witness, Hugh Brady, also gave evidence of having been assaulted during interviews which took place during the same period as those of Mr McCartney and Mr Donnelly. One of the detectives identified by Mr Brady as having assaulted him (Detective Constable Dalton) had also interviewed Mr McCartney and, as noted at para 126 above, Mr McCartney claimed that he too had been assaulted by this officer. Mr Brady was also found on medical examination to have multiple injuries, most notably bruising of the abdomen and a

burn to his hand which he claimed had been caused by the hand being forcibly held against a hot radiator. One of the doctors who examined him, Dr Hendron, who had been retained by Mr Brady's solicitors, concluded his medical report by saying that he had no doubt that Mr Brady had been assaulted, although he conceded during cross-examination at the trial of Mr McCartney and Mr MacDermott that Mr Brady may have exaggerated. Other doctors who examined Mr Brady believed that he had exaggerated and gave evidence to that effect.

130. Mr Brady did not make admissions and was not charged with any offences. Under cross-examination at the trial of Mr McCartney and Mr MacDermott it was also suggested to him that his injuries had been self inflicted. The trial judge, MacDermott J, did not find him an impressive witness for reasons that I will turn to presently.

131. Mr McCartney was examined by two doctors, Dr Henderson, the Force medical officer and Dr Hendron, who attended at the request of Mr McCartney's solicitors. The medical examination took place shortly after the tenth interview which had ended at 5.20 pm on 6 February 1977. A linear abrasion, 1 1/4 inches long was observed in the centre of McCartney's forehead, with two further small abrasions above and below it. Dr Hendron noted that Mr McCartney's right cheek was red and puffy. Dr Henderson had no note of this but on the form used to record the findings on examination he wrote "claimed struck on face - no evidence of any bruises". The mark on Mr McCartney's forehead was superficial; it was considered to have been present for a couple of days and was of a type that could be caused by a finger nail. When asked for his conclusions on the evidence, Dr Hendron stated that he had no doubt that Mr McCartney had been assaulted.

Mr MacDermott

132. Mr MacDermott had been arrested on 31 January 1977 and his interviews took place in Strand Road Police Station in Derry between the date of his arrest and 2 February. He claimed that he had been beaten before making admissions and had been abused and threatened on his way to the interview room. He also gave evidence that the principal statement of admission had been prepared by a detective officer while he, MacDermott, lay on a bed. It was claimed that his mental resolve had been so eroded by the assaults and threats that by the time the statement was being recorded, he did not care what it contained.

133. Mr MacDermott was examined by a number of doctors, including his own father who was a general medical practitioner. No significant signs of physical injury were found. He was observed to have tenderness of the jaw and ears which, he claimed, had been areas of assault. He also exhibited signs of "anxiety tension".

134. Towards the end of the trial, the judge asked counsel for the prosecution about the charges against Donnelly. He said, "Am I right in saying that the position is that he was charged and then what happened? The court was informed that no evidence was being offered?" Counsel for the prosecution replied, "He was never returned for trial. The charges were not proceeded with."

135. In a lengthy judgment the trial judge found that neither Mr McCartney nor Mr MacDermott had been ill-treated as they had alleged. Indeed, in relation to Mr McCartney, the judge declared that his "certain conclusion [was] that the Crown has satisfied me beyond reasonable doubt that McCartney was not ill-treated" and in relation to Mr MacDermott that he was absolutely satisfied that he had not been "ill treated in any way or threatened". The judge fully accepted the evidence of the police officers denying ill-treatment at all times. In relation to Mr Donnelly, the judge said that he was satisfied that the police had not assaulted or ill-treated him. Mr Brady was condemned as a dishonest and unreliable witness whose evidence the judge found did not assist in deciding whether Mr McCartney had been ill-treated.

136. Dr Hendron had expressed the strong opinion that Mr McCartney, Mr Donnelly and Mr Brady had been assaulted by police officers. MacDermott J said this about the doctor's evidence:

> "There is no doubt in my mind that Dr. Hendron believes, I am sure genuinely, that McCartney, Brady, Donnelly and others have been ill treated at Castlereagh, and such a conclusion could be reached by anyone who is prepared to form a conclusion after hearing only what might be described as 'one side' of the case. To my mind, Dr. Hendron's evidence throughout was coloured by this belief and lacked the professional objectivity displayed later by other doctors …"

Robert Barclay

137. On 2 January 1977 Robert Barclay was arrested and taken to Omagh Police Station where he was interviewed over a number of days by Detective Constables French and Newell (the same officers who had interviewed Mr Donnelly approximately one month later). Mr Barclay was said to have made admissions during these interviews. He also complained of ill-treatment at the hands of both detective officers. He alleged that they assaulted him by slapping him and punching him and that they had threatened him.

138. On 2 December 1977, after a trial in which he gave evidence that he had been assaulted by the officers, Mr Barclay was convicted on foot of the admissions that he had made during interview. He appealed his convictions. A solicitor had given evidence on his trial that when he saw Mr Barclay in court on 4 January he had a black eye. Two doctors who had examined him while he was at Omagh Police Station found signs of injury. On 12 April 1978, the then Lord Chief Justice of Northern Ireland, Lord Lowry, delivering the judgment of the Court of Appeal, quashed the convictions. Although no written judgment appears to have been given, Lord Lowry was recorded as having said:

> "It is not possible to exclude the conclusion that the injuries found on the accused were inflicted at Omagh Police Station and this renders inadmissible any statement made by him."

139. Subsequently, Mr Barclay brought a private prosecution against Detective Constable French and Detective Constable Newell. In his judgment, which was delivered on 25 April 1979, the trial judge in that case accepted that there was a strong prima facie case that Mr Barclay had been assaulted. He said that Mr Barclay had "undoubtedly sustained injuries in Omagh Police Station". He referred, however, to Mr Barclay's admission that, on other occasions quite unconnected with the proceedings against the police officers, he had been dishonest. Also, on certain matters relating to his interviews by the detectives (such as, for instance, which of them had taken the notes of the interview) Mr Barclay was found by the judge to have been inaccurate. But the medical evidence that was called on the prosecution of the police officers was found to be consistent with Mr Barclay's allegations. The judge said, however, that he could not be certain that the injuries had occurred at the time that Mr Barclay alleged they had been inflicted. The effect of the evidence made it unlikely that they were self inflicted but this was a possibility in the estimation of the judge. Therefore, on the basis that there was a reasonable doubt as to their guilt, he considered that he was left with "no alternative" but to acquit the officers.

140. Although the private prosecution of Detective Constables French and Newell took place after the trial of Mr McCartney and Mr MacDermott, Mr Barclay's appeal against his convictions had succeeded before their trial began. Their trial commenced on 18 September 1978. Of course, no reference to Mr Barclay's successful appeal was made during the trial of Mr McCartney and Mr MacDermott. There is no reason to believe that anything was known of that by those involved in their trial. On the contrary, the fact that such a relevant circumstance was not referred to is a clear indication that nothing was known about it.

The reasons that the prosecution of John Donnelly did not proceed

141. In a memorandum of 29 June 1977, Mr Roy Junkin, then an assistant director in the Department of the Director of Public Prosecutions, considered the prospects of success for the prosecution of Mr Donnelly. He concluded that a court would not accept that the statement of admission made by Mr Donnelly was voluntary. He therefore recommended that the prosecution should not proceed. That recommendation was accepted by Mr Junkin's superior, Mr George McLaughlin, to whom the memorandum had been addressed and a direction of no prosecution was duly issued.

142. Mr Donnelly was interviewed about his complaint of ill-treatment after being informed that the prosecution against him was not to proceed. Following the interview, Mr Junkin considered the papers again. In a further memorandum to Mr McLaughlin dated 6 October 1977, Mr Junkin reviewed all the evidence including that obtained from Mr Donnelly during the interview about his complaint. He stated that he had "no doubt that Donnelly was assaulted whilst in police custody at Castlereagh." The only detective identified by Mr Donnelly was Detective Constable Newell. He had claimed that this was the only police officer who had disclosed his name. Since this police officer had interviewed Mr Donnelly with Detective Constable French and since Mr Donnelly had said that both Detective Constable Newell and the other officer present had assaulted him, Mr Junkin recommended that both be prosecuted for assault.

143. In his response to Mr Junkin's recommendation, Mr McLaughlin, in a memorandum dated 10 March 1978 (6 months before the trial of Mr McCartney and Mr MacDermott began), agreed that there was no doubt that Mr Donnelly had been assaulted while in custody at Castlereagh. But Mr McLaughlin concluded that not all of Mr Donnelly's complaints were supported by findings on medical examination. He also considered that because 8 or 9 other police officers had interviewed Mr Donnelly the prosecution would not be able to establish that any particular injury had been inflicted by Detective Constables Newell and French. He therefore declined to accept Mr Junkin's recommendation that the officers be prosecuted.

The quashing of the appellants' convictions

144. On the hearing before the Court of Appeal of the reference by CCRC, Ms McDermott QC, appearing on behalf of Mr McCartney, submitted that if counsel for the prosecution had known the reason that the prosecution of Donnelly had been discontinued, he would not have put to him in cross-examination that his injuries were self inflicted. This submission does not appear to have been

countered by counsel who appeared for the Crown on the hearing of the reference and it does not feature in the conclusions expressed by the Court of Appeal in its judgment on the reference.

145. At the same hearing, counsel for the appellant Mr MacDermott drew attention to what he suggested was a striking similarity between the manner in which, on Mr Donnelly's account, a statement was taken from him by Detective Constable French and the way in which, according to Mr MacDermott, the most important statement of admission had been recorded from him by the same police officer.

146. Generally, it was submitted that if the trial judge had been aware of the reasons that Mr Donnelly had not been prosecuted (*viz* that an assistant director in the office of the DPP and a senior assistant director considered that he had certainly been assaulted by police officers) he would not have admitted the confession statements. It was suggested that the judge would have formed a more favourable view of the evidence of Mr Donnelly and Mr Brady and would have considered that the police officers' credibility was wholly undermined.

147. The Court of Appeal gave its decision on these arguments in the final paragraph of its judgment as follows:

> "We cannot rule out the possibility that the evidence of the police officers may have been discredited by evidence that is now available. The admission in evidence of MacDermott's confessions depended upon the acceptance by the judge of the evidence of DC French. If the judge had known of the finding of a prima facie case in the prosecution brought by Mr Barclay against DC French he may well have reached a different conclusion. To this is to be added the striking similarity between the description given by Donnelly and MacDermott as to the manner in which their admissions were recorded. If the allegations by Donnelly had been supported and strengthened by the new evidence this could have served also to discredit the evidence given by the police officers in McCartney's case. In both cases we are left with a distinct feeling of unease about the safety of their convictions based as they were on admissions and the convictions must therefore be quashed."

The challenge to the refusal of compensation

148. On 7 November 2007 a letter in the following terms was sent to Mr McCartney's solicitors in response to the application that they had made on his behalf for compensation under section 133 of the 1988 Act:

> "The Secretary of State has not yet reached a decision about the application; before he does so I would like to give you the opportunity to comment in writing on the views set out below.
>
> Under section 133 compensation is payable to an applicant where 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'. Mr McCartney's convictions were, we believe, 'reversed' within the meaning of section 133, by the decision of the Court of Appeal on 15 February 2007. We also tend to the view that this reversal was based on a new or newly discovered fact. However, in light of the available case law on these matters, we believe that your client has so far failed to establish that a new or newly discovered fact has shown beyond reasonable doubt that there has been a miscarriage of justice - either on the basis that your client is demonstrably innocent or on the basis of a failure of the trial process."

149. Further representations were made on behalf of Mr McCartney. Rejecting these, a letter dated 16 May 2008 sent on behalf of the Secretary of State, communicated his decision that Mr McCartney was not eligible under section 133. It contained the following passage:

> "The reasons for that decision are those as previously set out in my letter of 7 November. In your further representations you made two main points. Firstly, you suggest that there was a comprehensive failure to disclose material critical to Mr McCartney's defence. The Secretary of State does not consider that anything went wrong with the investigation of the offence or in the conduct of the trial so as to result in a failure of the trial process. Secondly, you suggest that the tape of the appeal should be listened to. It is the written judgment of the CoA that sets out the basis for the decision that a conviction was unsafe and therefore the basis on which the Secretary of State decides if the conditions for statutory compensation are fulfilled."

150. Similar letters were sent to solicitors acting for Mr MacDermott. These solicitors also made further representations and on 17 November 2008 a final responding letter was sent in which the following appeared:

> "We have now considered the other points you put to us on 1 August in relation to the *Boyle* case [*In re Boyle's Application* [2008] NICA 35]. The majority of the Court of Appeal in that case posed the test of whether the claimant should not have been convicted. We do not believe that the terms of the Court of Appeal's judgment in your client's appeal mean that he should not have been convicted. Therefore, the *Boyle* case does not alter the Secretary of State's decision that your client is not entitled to compensation."

151. Both appellants sought judicial review of the Secretary of State's decision. These applications were dismissed by Weatherup J, although it is clear that he felt that they might have succeeded if he had felt able to apply the test which, he considered, had been propounded by Lord Bingham in *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1. Weatherup J considered that there were two types of new or newly discovered fact (necessary as a prerequisite for eligibility under section 133, as explained by Lord Hope in paras 79 and 81 of his judgment). The first was the evidence that it had been accepted by the assistant director and the senior assistant director in the DPP's office that Mr Donnelly had been assaulted and that this would have tended to throw doubt on the credibility of the police witnesses. The second type was described by the judge in paras 23 and 24 of his judgment:

> "23…another part of the new evidence relating to the prosecution of Donnelly concerned the manner in which his evidence was dealt with at the trial. When Donnelly was called as a defence witness, counsel for the DPP, rather than proceeding on the position of the DPP officials dealing with the prosecution of Donnelly, adopted and put to Donnelly in cross-examination the police approach rejected by those officials, namely that Donnelly had received injuries after an attack on police officers and that some injuries were also self inflicted. Further, when the trial judge was considering the evidence of Donnelly, he asked counsel for the DPP about the absence of a prosecution of Donnelly and a complete reply was not furnished. It is important to note that this was a non jury 'Diplock' trial. It is apparent that the tria1 Judge was inviting counsel to disclose, as delicately as the situation demanded, whether there was a reason for the decision not to prosecute that related to matters other than the alleged ill-treatment of Donnelly, in respect of which the answer of counsel implied that there was. The trial judge was not told that the DPP had concluded that Donnelly had been ill treated, that his

> confession was not to be considered as being voluntary and there was no other evidence against him. There is no suggestion that counsel in the applicants' trial had been made aware of the DPP position relating to the prosecution of Donnelly. Had counsel for the DPP been aware of the DPP's approach to the prosecution of Donnelly two aspects of the trial would have been different. First of all, the cross-examination of Donnelly would have taken a different course and counsel would not have put to Donnelly that his injuries had been occasioned by defensive action by the police and by his own hand. Secondly, the submission of counsel for the DPP in relation to the prosecution of Donnelly would not have rested on the bald assertion that the prosecution was not proceeded with but should have indicated the basis of the DPP decision.
>
> 24 Thus the issue of the treatment of the Donnelly evidence is not directly a matter about the credibility of the evidence given by the police officers, nor is it directly a matter about withholding disclosure from the defence. Rather it is a matter about the conduct of the prosecution in relation to the evidence of a witness who was central to the defence challenge to the voluntariness of the admissions on which the applicants were convicted. In light of the above discussion of the Donnelly evidence there is a basis for concluding that something had gone seriously wrong with the conduct of the trial. This is a matter that is capable of satisfying the wider interpretation of miscarriage of justice expounded by Lord Bingham."

152. It is evident from these passages that Weatherup J considered that it would have been quite wrong for prosecuting counsel, had he known of the reasons that Mr Donnelly had not been prosecuted, to pursue the line of questioning that he did. On the hearing of the appeal before this court Mr Maguire QC, who appeared on behalf of the Secretary of State for Northern Ireland, was unable to confirm that Crown counsel was unaware of the reasons that the prosecution of Mr Donnelly was not pursued but I share Weatherup J's view that this is the only possible explanation for his having cross-examined Mr Donnelly as he did.

153. Mr Junkin and Mr McLaughlin had concluded that Mr Donnelly had been assaulted by police officers. If that view (which was the product of extensive consideration of all the relevant material) had been communicated to prosecuting counsel, it would have been improper for him to advance a case which was quite at odds with the conclusion that had been reached by two experienced officers in the department of the Director of Public Prosecutions. At a more fundamental level, however, it was not open to the prosecuting authority to adopt a different stance in relation to Mr Donnelly's evidence according to the context in which it was being

considered or, as Lord Rodger so pertinently put it during argument, "to face both ways". The decision not to prosecute Mr Donnelly on a charge of murder and one of causing an explosion when, according to police evidence, he had voluntarily admitted to both was a momentous one. It is unsurprising that Mr Junkin and Mr McLaughlin only felt able to take that course because they were convinced that he had been assaulted by police officers. It is simply incompatible with the prosecution's duty of fairness for a different position to be taken thereafter as to the manner in which Mr Donnelly's injuries were caused unless there was fresh evidence that warranted a different view. In this instance there was no such evidence. Weatherup J was therefore perfectly right when he said that something had gone seriously wrong with the conduct of the trial. Crown counsel ought to have been aware of the DPP's position on this and, if he had been, cross-examination of Mr Donnelly challenging his account of how he sustained his injuries would not have taken place.

154. Although Weatherup J concluded that the circumstances of the reversal of the appellants' convictions were capable of satisfying the test that Lord Bingham had propounded for eligibility for compensation under section 133, he felt bound to follow more recent authority in England and Wales, particularly *R (Allen) (formerly Harris) v Secretary of State for Justice* [2009] 1 Cr App R 36 which had expressed a clear preference for the test advocated by Lord Steyn in *Mullen*.

155. The appellants' appeal against the decision of Weatherup J was dismissed by the Court of Appeal. That court did not share Weatherup J's view that the circumstances revealed by the judgment which had quashed the appellants' convictions were sufficient to satisfy Lord Bingham's formulation of the correct test. The conclusions of the court are contained in para 15 of the judgment of the Lord Chief Justice:

> "In the second category of cases it is necessary to demonstrate that something has gone seriously wrong in the conduct of the trial resulting in the conviction of someone who *should not* have been convicted. In this case the new facts upon which the appellants rely raise issues about the credibility of one police officer and one other witness. It is not possible to come to any conclusion as to whether the new facts would have led to a different outcome in respect of the assessment of either witness. The new evidence was sufficient to give rise to unease about the safety of the conviction but this is a case in which at its height it can only be said that the appellants *might not* have been convicted. Such a case lies outside either of the categories identified by Lord Bingham. That is also the reasoning of the decision in *Boyle's Application* [2008] NICA 35 by which we are bound."

Should the appellants have been acquitted?

156. *In re Boyle's Application* [2008] NICA 35 was an appeal in which the appellant claimed entitlement to compensation under section 133 and the ex gratia scheme which was then still extant. Some years after the appellant's conviction a note taken of one of a series of interviews had been shown by electrostatic detection apparatus (ESDA) testing techniques to have been made at a time other than that claimed by police officers. Another version of the note for that single interview existed, contrary to the denials of the interviewing police officers. The differences were not substantial and nothing which was inculpatory of the appellant had been written in to the version of the notes that had been presented to the court and which the police officers claimed was the only note of the interview. Nevertheless, because the police officers had firmly denied that a different version had been prepared and because that had been shown to be incorrect, it was considered that doubt had been thrown on their credibility and the appellant's conviction could not be regarded as safe.

157. In dismissing Mr Boyle's appeal against the finding that he was not eligible to apply for compensation under section 133, the Court of Appeal said at para 22:

> "it is impossible for the appellant to assert that he should not have been convicted. One can certainly say that the police officers should not have given the evidence that they did. One may even say with confidence that the trial judge is bound to have taken an entirely different view of their credibility from the extremely favourable impression that he appears to have formed. But it is impossible to conclude that the appellant would not have been found guilty (much less that he should have been acquitted) if evidence of the other version of the interview notes had been given."

158. The circumstances in the *Boyle* case were obviously and markedly different from those that arise in the present appeals of Mr McCartney and Mr MacDermott. The most that could be said in *Boyle* was that the newly discovered fact (that there was a different version of the notes of a single interview) cast doubt on the credibility of the police officers who asserted to the contrary. By contrast, although the Court of Appeal which quashed Mr McCartney's and Mr MacDermott's convictions expressed itself in a restrained fashion, there is simply no doubt that these appellants ought not to have been convicted. For the reasons that I have given, it was not open to prosecuting counsel to challenge Mr Donnelly's account that he had been assaulted by police officers. I am satisfied that he would not have done so if he had been aware of the true circumstances in which the decision not to continue with the prosecution of Mr Donnelly had been taken. Mr Donnelly's evidence that he had been assaulted would therefore have been received without

challenge. That evidence, if uncontradicted, is bound to have changed the entire course of the trial. It could not have done less than establish the reasonable possibility that Detective Constable French had assaulted Mr Donnelly and that he had recorded a statement purporting to come from him but which was not given at Mr Donnelly's dictation. When those inevitable findings were brought to bear on Mr MacDermott's case they could not have done other than create a doubt as to the voluntariness of his admissions.

159. Section 8(2) of the Northern Ireland (Emergency Provisions) Act 1978 was in force at the date of the trial. It provided:

> "If, in any such proceedings [ie criminal proceedings for a scheduled offence] where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies it that the statement was not so obtained-
>
> (a) exclude the statement, or
> (b) if the statement has been received in evidence,
> either –
> (i) continue the trial disregarding the statement; or
> (ii) direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible)."

160. The trial judge had reminded himself of this provision at the beginning of his judgment. He said that the appellants had raised a prima facie case as required by the section and that, in those circumstances, "the burden passes to the Crown to satisfy me beyond reasonable doubt that the statement, whose admissibility is challenged, was not obtained by ill treatment. In other words, a prima facie case of ill treatment having been established the burden rests squarely on the Crown of satisfying me (and by that I mean satisfying me beyond reasonable doubt) … that the accused was not ill treated."

161. In making these observations the trial judge was reflecting the well known statement of the law in this area provided by Lowry LCJ in *R v Hetherington* [1975] NI 164, 168 where he said:

> "It is not for the defence to prove but for the prosecution to disprove beyond reasonable doubt in relation to each accused that he was not subject even to any degrading treatment in order to induce him to make a statement on which the Crown rely, … the decision under section 6(2) [the precursor of section 8(2) of the 1978 Act] must be based solely on how the statement is proved to have been obtained and not on whether it was true."

162. The prosecution would therefore have had to prove beyond reasonable doubt that the statements made by Mr McCartney and Mr MacDermott had not been obtained by any degrading treatment whatever. It can now be seen that this would have been an impossible task had the full facts and circumstances come to light. A person detained at the same time as Mr McCartney had been assaulted while in Castlereagh Police Office during the same period; the police officers who carried out the assaults on Mr Donnelly were part of the group of officers who were investigating the murders with which Mr McCartney was charged; one of the officers who had assaulted Mr Donnelly had been accused by Mr MacDermott of assaulting him; and the other officer who, according to Mr MacDermott, had assaulted him, had also interviewed Mr McCartney and had been accused of assault by him.

163. Quite apart from these considerations, two further factors of substantial importance must be taken into account. Firstly, by the time that Mr McCartney and Mr MacDermott stood trial, Mr Barclay's conviction, based on statements of admission allegedly obtained by Detective Constable French and Detective Constable Newell on interview, had been quashed. If the trial judge had been aware that this conviction had been quashed because the possibility that Mr Barclay had been assaulted by these two officers could not be excluded (which was the necessary implication from the finding of the Court of Appeal) he could not have concluded with the same firmness that he did that Detective Constable French had not engaged in ill-treatment of Mr MacDermott. Secondly, once it was established, even as a reasonable possibility, that Mr Donnelly had been assaulted, the judge's view of Dr Hendron's evidence could not have remained as he had expressed it in his judgment. Dr Hendron had stated unequivocally that he was convinced that Mr McCartney, Mr Donnelly and Mr Brady had been assaulted. The judge found that this opinion was sincerely held but that Dr Hendron's evidence was coloured by his conviction that the men had been attacked and on that account his testimony lacked professional objectivity. If it had become known that the doctor's view about Mr Donnelly was shared by an assistant director and a senior assistant director in the department of the Director of Public Prosecutions, it is not likely that his opinion would have been dismissed in the manner that it was by the trial judge.

164. The combined effect of all these factors makes it inevitable, in my opinion, that, had the judge been fully acquainted with all the material information about the reasons for the decision not to continue the prosecution of Mr Donnelly and the circumstances of the quashing of Mr Barclay's convictions, he would not have convicted the appellants.

Should the appellants have been prosecuted?

165. Not only should the appellants have been acquitted, in my opinion they should not have been put to their trial. If prosecuting counsel had become aware of the shadow that necessarily fell on Detective Constable French's evidence by the decision not to proceed with the prosecution of Mr Donnelly and by the quashing of Mr Barclay's conviction, it is, in my view, inevitable that he could not have proffered this officer as a witness of truth on the issue of whether Mr MacDermott had been ill-treated. Moreover, the conclusion of Mr Junkin and Mr McLaughlin that Mr Donnelly had been assaulted cast significant doubt on the evidence of the entire interviewing team. Although Mr McLaughlin considered that there was insufficient evidence to charge Detective Constables French and Newell, he was of the clear view that Mr Donnelly had been physically attacked by some police officers. It was therefore the case that the office of the Director of Public Prosecutions had determined that some officers within the team that conducted interviews of Mr Donnelly, Mr Brady and Mr McCartney had been guilty of assault on Mr Donnelly.

166. Mr Brady alleged that he had been assaulted in much the same manner as Mr Donnelly had been. Despite this, he had not made admissions. He had no personal advantage to gain by fabricating his account of the attacks on him. The trial judge found, however, that he was prepared to do so in order to help a friend (Mr McCartney) and because of his animus towards the police. I cannot believe that the judge would have reached that view if he had known that the DPP had concluded that Mr Donnelly had been assaulted and that Mr Barclay's conviction had been quashed because of the reasonable possibility that two members of the same interviewing team had also assaulted him.

167. Likewise, I cannot believe that if experienced Crown counsel had been aware of these matters he would have done other than advise that the prosecution of Mr McCartney and Mr MacDermott should not proceed. That prosecution was only viable if there was a realistic prospect of the Crown establishing beyond reasonable doubt that Mr McCartney and Mr MacDermott had not been ill-treated. Any objective assessment of all the circumstances as they are now known was bound to have resulted in the conclusion that there was no such prospect. In reaching this view I intend no criticism whatever of counsel who, for the reasons that I have given, must have been wholly unaware of why it had been decided not

to prosecute Mr Donnelly. He must also have been ignorant of the fact that Mr Barclay's conviction had been quashed and of the circumstances in which that had occurred. A fortiori, no criticism of the trial judge is warranted. On the contrary, he made what in retrospect was an astute and pertinent inquiry as to why Mr Donnelly had not been prosecuted and was not given the information which, if it had been provided, would certainly have led to a completely different outcome. While it might be said that the assistant director and the senior assistant director in the department of the Director of Public Prosecutions ought to have been alive to the impact that their conclusion about the assaults on Mr Donnelly was bound to have on the propriety of proceeding with the prosecution of Mr McCartney and Mr MacDermott, there is no reason to suppose that they were aware of the quashing of Mr Barclay's convictions or of the evidence of Mr Brady. Neither is discussed in the exchange of memoranda between Mr Junkin and Mr McLaughlin. These are matters which have played a significant part in leading me to the conclusion that the prosecution of Mr McCartney and Mr MacDermott ought not to have taken place.

168. In deciding that the appellants ought not to have been convicted and, indeed, ought not to have been required to stand trial, I have gone beyond the findings of the Court of Appeal which quashed their convictions. On one reading, the letter of 16 May 2008 sent on behalf of the Secretary of State suggests that the judgment of the Court of Appeal provides the exclusive basis on which the Secretary of State decides if the conditions for statutory compensation are fulfilled. And much was made in the course of argument of an answer given by Earl Ferrers in the course of the passage through the House of Lords of the Bill which ultimately became the 1988 Act. Earl Ferrers' answer was to the effect that the Secretary of State would regard the Court of Appeal's view as to whether there had been a miscarriage of justice as "binding".

169. In my opinion, the decision as to whether the statutory conditions have been fulfilled is one for the Secretary of State to make and he may not relinquish that decision to the Court of Appeal. True, of course, it is that the material on which the decision is taken will derive in most cases from the judgment of the Court of Appeal. True it also is that it would not be appropriate for the Secretary of State to depart from the reasoning that underlies that judgment unless for good reason it is shown to be erroneous but the Secretary of State must make his own decision based on all relevant information touching on the question whether there has been a miscarriage of justice. In the present appeals, Weatherup J considered that it was open to him to examine the question whether there had been a miscarriage of justice not merely by reference to what the Court of Appeal had said but by taking into account the circumstances revealed by its judgment. At para 20 of his judgment he said:

> "Counsel for the respondent contends that there is nothing in the judgment of the Court of Appeal indicating that the applicants should not have been convicted. It should not be expected that a Court of Appeal will state in terms that an appellant should not have been convicted. The approach of the Court of Appeal on an appeal against conviction is concerned with whether that conviction is 'unsafe'. In taking the cue from the Court of Appeal in determining a successful appellant's entitlement to compensation it is necessary to have regard to the circumstances set out in the judgment of the Court of Appeal as well as the wording adopted in the judgment in relation to the position of the appellant."

170. I agree with these observations and they appear, implicitly at least, to have been approved by the Court of Appeal. As Weatherup J stated, the task of the Court of Appeal is not to decide whether the appellant should have been convicted, much less to determine whether the appellant is innocent. It is to decide whether the conviction is safe. The decision whether there has been a miscarriage of justice (whatever meaning is to be given to that phrase) of necessity takes place on a different basis and on foot of consideration of issues beyond those which sound only on whether the conviction is safe.

Section 133

171. As Lord Hope has said, it has been possible until now for courts to avoid a final resolution of the question of what is required in order to establish entitlement to compensation under section 133 of the 1988 Act. Must a person whose conviction has been reversed as the result of a new or newly discovered fact show that he was innocent (Lord Steyn's view in *Mullen*) or can eligibility arise in somewhat wider circumstances (Lord Bingham's provisional opinion)? These appeals require this court to confront that debate and to resolve that conflict.

172. For the reasons given by Lord Hope and Lord Clarke, with which I agree, the analysis of Lord Bingham in *Mullen* as to the possible scope of section 133 is to be preferred to that of Lord Steyn. 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. It may observe that the effect of the material considered in the course of the appeal is demonstrative of innocence but it has no statutory function to make a finding to that effect: *R v McIlkenny* (1991) 93 Cr App R 287.

173. It is therefore not surprising that in New Zealand when the Law Commission proposed that a prerequisite of establishing entitlement to compensation for a wrongful conviction was proof of innocence, it was careful to recommend that a tribunal be set up in which that issue could be frankly addressed and confidently determined: see New Zealand Law Commission Report No 49 (1988) "Compensating the Wrongly Convicted" paras 124-127 and 136-137. In Canada in 1988 *Federal/Provincial Guidelines on Compensation for Wrongly Convicted and Imprisoned Persons* likewise required that there be proof of innocence in order to qualify under the ex gratia scheme operated there. In the case of *Dumont v Canada* (Communication 1467/2006, 21 May 2010) the UN Human Rights Committee held that the failure of the state authorities to establish a procedure for conducting an investigation to examine whether the applicant was innocent and to possibly identify the real perpetrator constituted a breach of article 2(3) of ICCPR read in conjunction with article 14(6). Article 2(3)(a) requires that state authorities provide an effective remedy in the form of access to a procedure in which adequate compensation can be claimed.

174. The respondents in this case rely on the experience in New Zealand and Canada in support of their argument 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 of the offence with which he is charged. The Human Rights Committee in *Dumont*, while recording the state's submission to that effect, reached its decision without adjudicating on it. The New Zealand Law Commission's report does not suggest that article 14(6) must be given that meaning. On the contrary para 71 of the report states that article 14(6) while "an important normative statement by the international community and … a reference point for domestic compensation schemes" was not relied on as a model for the Commission's recommended scheme.

175. There was no unanimity as to the meaning to be given to 'miscarriage of justice' among the delegates who were involved in the negotiations which led to the adoption of ICCPR: see para 9(2) of Lord Bingham's speech in *Mullen.* As he observed, it is possible that the expression commended itself because of the latitude in interpretation which it offered. Or, as the New Zealand Law Commission put it, it is a normative statement which provides a general template for domestic provisions in the subscribing states which can vary as to content. Certainly, while the travaux préparatoires may be regarded as neutral on the meaning of the expression, it is unquestionably clear from these that every proposal that its ambit should be confined to compensating those whose innocence

was established was roundly defeated. Against that background, it would be a surprising conclusion that article 14(6) had the very effect that a majority of delegates clearly did not intend.

176. The twin theses on which Lord Steyn relied to support his conclusion that proof of innocence was required in order to establish entitlement to compensation under section 133 have been subject to scrupulous examination in paras 93 and 94 of Lord Hope's judgment. For the reasons that appear there, with which I fully agree, these arguments can no longer be regarded as sound. I also agree with Lord Clarke's reasons for rejecting Lord Steyn's formulation of the test. As Lord Clarke has pointed out, if Parliament had intended that a proof of innocence test was to be preferred, that could surely have been easily prescribed. The debate as to whether such a test was appropriate had been extensively referred to in the travaux préparatoires and it is to be presumed that Parliament was aware of this when it came to enact section 133. Confining the application of the section to those who could show that they were innocent was, in any event, a perfectly obvious option. The failure to articulate that test in the legislation can only be explained on the basis that Parliament decided not to choose that option. This conclusion is fortified by the consideration that the expression "miscarriage of justice", although its meaning may vary according to context, is a very familiar one in our system of law. In no other context has it been used to connote proof of innocence. I am therefore satisfied that proof of innocence cannot be the criterion on which entitlement to compensation under section 133 is to be determined.

177. Rejection of this hypothesis brings with it the need to determine how "miscarriage of justice" is to be interpreted. As Lord Hope has said, a fresh analysis is required and for the reasons that he gives the answer is not necessarily provided by the speech of Lord Bingham in *Mullen*. The use of the word "conclusively" in article 14(6) of ICCPR and the expression "beyond reasonable doubt" lends support to the view that the section does not contemplate that all whose convictions have been quashed and who satisfy the other requirements of the section will be entitled to compensation. On this there is no dispute between the parties to these appeals. Lord Hope has proposed that the section should be interpreted as targeting those cases where, as a consequence of the state of affairs revealed by the new or newly discovered fact, it can be concluded that no prosecution ought to have taken place. Lord Clarke prefers to define the category of eligibility as extending to those cases where the new or newly discovered fact leads inexorably to the conclusion that no jury, properly directed, would have convicted. As a matter of practical experience, there may be little difference as to which of these tests should be applied. But it is important that, if possible, clear guidance be given by this court as to the circumstances in which the section should be held to apply.

178. Lord Hope has pointed out that requiring the Secretary of State to apply a test which refers to what a reasonable jury would do is not appropriate since this is a matter best left to the courts. Lord Clarke, on the other hand, suggests that a test which requires the Secretary of State to focus on whether the claimant should never have been prosecuted runs the risk of the inquiry wrongly focusing on the propriety of the decision to prosecute by reference to the circumstances that obtained when the decision was taken. There is substance in both concerns. I believe that a simple test can cater for these concerns and will also faithfully reflect the intention of article 14 (6) and section 133 that only truly deserving applicants should be included in the compensatory scheme. The test which I would have proposed was: whether, on the facts as they now stand revealed, it can be concluded beyond reasonable doubt that the applicant should not have been convicted. Lord Phillips has suggested that the test should be worded in the following way: the new fact shows 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 appears to me to achieve the same result as the test which I would have proposed and I am therefore quite content to subscribe to his formulation. The proper application of either test ties entitlement to compensation firmly to the true factual situation. Procedural deficiencies that led to irregularities in the trial or errors in the investigation of offences will not suffice to establish entitlement to compensation. A claimant for compensation will not need to prove that he was innocent of the crime but he will have to show that, *on the basis of the facts as they are now known*, he should not have been convicted or that conviction could not possibly be based on those facts. Of course, if innocence can be proved, the test, on either formulation, will be amply satisfied.

179. The adoption of a single, simple test dispenses with the need to consider possible categories of entitlement which, I believe, tends more to confuse than to enlighten. As it happens, although it is possible to construct from Lord Bingham's observations a fourth category of case beyond the three that were identified by Toulson LJ in giving permission to appeal in the *Adams* case, I do not believe that Lord Bingham intended that this be considered a freestanding category.

New or newly discovered fact

180. I find myself in complete agreement with the reasoning of Dyson LJ on this issue in the judgment of the Court of Appeal in *Adams* [2010] QB 460, paras 14-16 and with what Lord Phillips has had to say on the matter in paras 59-63 of his judgment. The "newly discovered" limb of the requirement clearly, to my mind, connotes discovery by the party who prays it in aid to demonstrate that he should not have been convicted. It would be wholly anomalous, as Dyson LJ has pointed out, that a person whose innocence can be conclusively proved, should be deprived of compensation simply because his lawyers failed to communicate the vital information or failed to grasp its significance.

Does denial of compensation infringe the presumption of innocence?

181. Lord Hope has dealt comprehensively with the arguments made by the appellants on this issue in paras 108 to 111 of his judgment. I agree with his reasons for rejecting the arguments. There is nothing further that I could usefully say on the topic.

Conclusions

182. I would allow the appeals of Mr McCartney and Mr MacDermott. For the reasons that I have given, I am satisfied that, on the facts as they are now known, they should not have been convicted. As it happens, I am also satisfied that they ought not to have been prosecuted and their cases therefore fulfil the requirement that Lord Hope has formulated. Clearly they also satisfy the test preferred by Lord Clarke of being cases in which no reasonable jury, properly directed, could convict. Like Lord Phillips and Lord Hope I consider that both are entitled to be compensated under section 133.

183. Although I would hold that the material on which Mr Adams relied constituted a newly discovered fact, I do not consider that he has demonstrated that, on the facts as they now stand revealed, it can be concluded beyond reasonable doubt that he should not have been convicted. I would dismiss his appeal.

LORD CLARKE

Introduction

184. I gratefully adopt Lord Hope's description of the background to the introduction of the statutory right to compensation for miscarriages for justice in section 133 of the Criminal Justice Act 1988 in the light of article 14(6) of the ICCPR. He has set out the relevant provisions of section 133 and article 14(6). I shall not therefore repeat them. The principal issues for decision in this appeal are the meaning of the expressions "miscarriage of justice" and "new or newly discovered fact" in those provisions.

Miscarriage of justice

185. The meaning of this expression has been considered in a number of cases as described by Lord Hope. I agree with him that it is helpful to consider its meaning in the present context by reference to the categories identified by Toulson LJ when giving permission to appeal to the Court of Appeal in the *Adams* appeal which are described by Dyson LJ [2010] QB 460, at para 19 of his judgment which is quoted in full by Lord Hope. Dyson LJ described the categories of case thus:

> "A category 1 case is where the court is sure that the defendant is innocent of the crime of which he has been convicted. An obvious example is where DNA evidence, not obtainable at the time of trial, shows beyond doubt that the defendant was not guilty of the offence. A category 2 case is where the fresh evidence shows that he was wrongly convicted in the sense that, had the fresh evidence been available at the trial, no reasonable jury could properly have convicted. An example is where the prosecution case rested entirely on the evidence of a witness who was put forward as a witness of truth and fresh evidence undermines the creditworthiness of that witness, so that no fair-minded jury could properly have convicted on the evidence of that witness. It does not follow in a category 2 case that the defendant was innocent. A category 3 case is where the fresh evidence is such that the conviction cannot be regarded as safe, but the court cannot say that no fair-minded jury could properly convict if there were to be a trial which included the fresh evidence. The court concludes that a fair-minded jury might convict or it might acquit. There is a fourth category of case to which Lord Bingham referred in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1. This is where a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

186. The respondents say that there is only a miscarriage of justice within the meaning of article 14(6) and section 133 in a category 1 case. They say that the provision that the new or newly discovered fact must show "conclusively" (in article 14(6)) or "beyond reasonable doubt" (in section 133(1)) that there has been a miscarriage of justice points to the conclusion that it is only where the claimant can prove his innocence that there has been a miscarriage of justice. The appellants say, by contrast, that the words "conclusively" and "beyond reasonable doubt" do not inform the meaning of "miscarriage of justice" but only indicate the standard of proving the miscarriage of justice, once its meaning has been established. They say that if the Court of Appeal allows an appeal in any of the three categories of case there will have been a miscarriage of justice, unless the claimant is convicted

at a retrial. Another possibility is, of course, that section 133 applies in a category 1 and a category 2 case, but not to a category 3 case.

Category 1 – proof of innocence

187. I turn first to the question whether the expression "miscarriage of justice" is confined to the case where the claimant can prove beyond reasonable doubt that he was innocent. This was of course the view espoused by Lord Steyn in *Mullen*. Lord Bingham expressed a different view in that case, albeit without reaching a firm conclusion, and Lord Hope has taken a different view in this case. I agree with him. To my mind there is nothing in either the language or the context to limit the meaning of "miscarriage of justice" to the case where the claimant can prove that he was innocent. If that is so, it is not for the court to limit the meaning because its own view is that it would be desirable to do so as a matter of policy. Such matters of policy are for Parliament and not for the courts.

188. It is common ground that the expression is capable of a broader meaning than that espoused by Lord Steyn. For reasons which I explain below, to my mind the natural meaning is broader, but I will begin with the context because I appreciate that, as has famously been said, context is everything. The context of section 133 is of course article 14(6). Both Lord Steyn and Lord Bingham considered the travaux préparatoires in *Mullen*. In para 9(2) of his speech Lord Bingham said this:

> "The House was referred to the travaux préparatoires of the negotiations which culminated in adoption of the ICCPR. It is plain that some delegates contended that compensation should not be paid save to those who were shown to be innocent, and such delegates found no difficulty in expressing this very simple principle. But it is equally plain, as Mr Pleming submitted, that every proposal to that effect was voted down. The travaux disclose no consensus of opinion on the meaning to be given to this expression. It may be that the expression commended itself because of the latitude in interpretation which it offered."

189. It is common ground that the expression "miscarriage of justice" in article 14(6) and therefore section 133(1) should if possible be given an autonomous meaning. Although the travaux are far from conclusive, they do seem to me to point the way because, as Lord Bingham put it, every proposal that innocence should be the test was turned down. So, if the expression is to be given an autonomous meaning, it cannot be limited to cases where innocence can be shown. It follows that I do not agree with Lord Steyn's view that the travaux do not assist

in any way. On the contrary, they assist on the first question in this appeal, namely whether proof of innocence should be the test.

190. I agree with Lord Steyn (at para 35) that there is no foundation in the language of article 14(6) and section 133, or by reference to any relevant external aids to construction, for the suggestion that Parliament intended to use the words "miscarriage of justice" in any wider sense than it bears in article 14(6) and that Parliament intended to give effect to the United Kingdom's international obligations in article 14(6) "and no more". I would add "and no less". Parliament used the same or almost the same language, so that there is to my mind no warrant for holding that it intended to confer narrower rights to compensation than those afforded by article 14(6).

191. As Lord Hope observes at para 91, Lord Steyn correctly said at para 45 that both article 14(6) and section 133 show that there was no overarching purpose of compensating all who are wrongly convicted. This is demonstrated by the fact that compensation only arises at all in the case of appeals out of time and by the indispensable pre-condition that a new or newly discovered fact shows conclusively (or beyond reasonable doubt) that there has been a miscarriage of justice. So, for example, in the case of 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. As Lord Steyn put it, those considerations demonstrate that the fundamental right under article 14(6) was unquestionably narrowly circumscribed.

192. Para 46 is the only paragraph in which Lord Steyn focuses on the relevant language. In it, as Lord Hope explains at paras 91 and 92, Lord Steyn focused on the language of article 14(6) and section 133, and in particular on the use of "conclusively" and "beyond reasonable doubt" respectively. He said that that language filters out cases where it is only established that there *may* have been a wrongful conviction and cases where it is only probable that there has been a wrongful conviction. He observed that those two categories would include the vast majority of cases where an appeal is allowed out of time. He concluded that those considerations militated against an expansive interpretation of "miscarriage of justice" and ultimately held that:

> "While accepting that in other contexts 'a miscarriage of justice' is capable of bearing a narrower or wider meaning, the only relevant context points to a narrow interpretation, viz, the case where innocence is demonstrated."

193. I accept that the language points to a narrow construction but not that it is restricted to the case where innocence is demonstrated. Indeed, to my mind Lord Steyn did not point to any reason why the right to compensation should be so confined. There is nothing in the language or the context to lead to the conclusion that cases in category 2 should be excluded. Yet the expression "miscarriage of justice" naturally includes such a case. Indeed it seems to me to be the paradigm case. A criminal trial is concerned (and concerned only) with the question whether the prosecution has proved beyond reasonable doubt to the satisfaction of the jury that the defendant is guilty of the offence charged.

194. If the new or newly discovered fact shows that, in the light of it, no reasonable jury, properly directed, could have convicted the accused, to my mind his conviction would, in ordinary language, be a miscarriage of justice. I see no reason why such a case should not be a "miscarriage of justice" within the meaning of article 14(6) or section 133(1). None of Lord Steyn's reasoning leads to the conclusion that it is not. He himself did not address this possibility.

195. In paras 91 to 95 Lord Hope has given his reasons for disagreeing with Lord Steyn that innocence must be proved. I agree with them. I would very briefly summarise my own reasons (in addition to those already given) in this way.

(a) If Parliament had intended to limit miscarriages of justice to cases where the claimant could prove innocence, it would have been easy to say so. As Lord Bingham put it in *Mullen* at para 9(2) quoted above, those delegates who wished to limit compensation in that way "found no difficulty in expressing this very simple principle".

(b) In para 9(1) Lord Bingham noted that when what was to become section 133 was debated in the House of Lords, the minister, Earl Ferrers, was pressed by Lord Hutchinson QC to say whether a miscarriage of justice connoted the innocence of a defendant or the raising of a doubt about his guilt, but the minister said nothing to suggest that compensation would be payable only to the innocent: Hansard (HL Debates), 22 July 1988, cols 1631-1634.

(c) Lord Steyn's reliance upon the words "une erreur judiciaire" in the French text of article 14(6) was unsound for the reasons given by Lord Hope at para 93.

(d) The five reasons given by Lord Bingham in para 9(4) of *Mullen* for thinking that reliance upon para 25 of the explanatory report prepared by a committee of experts on human rights with reference to article 3 of the Seventh Protocol was not of the persuasive value which Lord Steyn identified are convincing: see Lord Hope at para 94.

(e) Little assistance is to be gained from either the jurisprudence of the United Nations Human Rights Committee or academic opinion.

(f) Courts of appeal are not called upon to decide whether defendants are innocent: see Lord Bingham at para 9(6) and Lord Hope at para 95.

196. If, as I believe is the case, Lord Steyn's test is too narrow, the question arises what is the correct construction of the expression "miscarriage of justice" in this context. I will consider the possibilities in turn.

Category 2 – no reasonable jury properly directed could convict

197. Category 2 would of course include category 1, but not vice versa. Mr Owen QC submitted that cases in this category would involve a miscarriage of justice, although he also sought to include category 3, to which I will return. I have already expressed my view that there is nothing in the language or context of article 14(6) or section 133 to exclude category 2 and that the expression naturally includes it.

198. Absent any clear indication in the language or context, it is to my mind permissible to have regard to the approach to it within the United Kingdom. In 1988 the Court of Appeal in England and Wales determined criminal appeals by reference to the unamended section 2(1) of the Criminal Appeal Act 1968. The proviso to that subsection provided that, notwithstanding that the Court of Appeal were of the opinion that the point raised in the appeal might be decided in favour of the appellant, they "may … dismiss the appeal if they consider that no miscarriage of justice has actually occurred".

199. In *R v Secretary of State for the Home Department, Ex p Bateman* (1994) 7 Admin LR 175 the Court of Appeal (Sir Thomas Bingham MR, Farquharson and Simon Brown LJJ) dismissed an appeal from an order of the Divisional Court

refusing judicial review of a decision refusing the appellant compensation under section 133. He had been convicted of several counts of receiving stolen goods and sentenced to six years' imprisonment. He had appealed to the Court of Appeal on the ground that he had been convicted on the basis of evidence in statement form given by witnesses from New Zealand. His appeal failed. Some time later his case was referred back to the Court of Appeal under section 17 of the Criminal Appeal Act 1968. This time his appeal succeeded on what was essentially the same ground as that which had failed before and his convictions were quashed.

200. In the Court of Appeal he argued inter alia that the second Court of Appeal must have regarded his conviction as a miscarriage of justice because they would otherwise have applied the proviso. Sir Thomas Bingham (with whom the other members of the court agreed) said this:

> "Therefore, it follows, he says, that he is a victim of a miscarriage of justice and from that it follows that he is entitled to compensation. To deny him compensation is, he argues, to undermine his acquittal and the presumption of innocence which flows from the fact that his convictions have been quashed. I am, for my part, unable to accept that argument, although I hasten to assure Mr Bateman that in doing so I have no intention whatever to undermine the effect of the quashing of his convictions. He is entitled to be treated, for all purposes, as if he had never been convicted. Nor do I wish to suggest that Mr Bateman is not the victim of what the man in the street would regard as a miscarriage of justice. He has been imprisoned for three-and-a-half years when he should not have been convicted or imprisoned at all on the second decision of the Court of Appeal (Criminal Division). The man in the street would regard that as a miscarriage of justice and so would I. But that is not, in my judgment, the question. The question is whether the miscarriage of justice from which Mr Bateman has suffered is one that has the characteristics which the Act lays down as a pre-condition of the statutory right to demand compensation. That, therefore, is the question to which I now turn."

201. The Master of the Rolls then held that there was no new or newly discovered fact, so that Mr Bateman could not satisfy the relevant criteria under section 133.

202. The relevance of the statement quoted above is that it supports the conclusion that the Master of the Rolls accepted that there had been a miscarriage of justice within the meaning of section 133, which in turn supports the conclusion

that that expression is not limited to cases in which the claimant can prove his innocence. It is perhaps the forerunner of Lord Bingham's approach in *Mullen*.

203. A similar conclusion can be drawn from the terms of section 106, of the Criminal Procedure (Scotland) Act 1995, which sets out the test for criminal appeals in Scotland. By subsection (3) it provides:

> "By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on – (a) subject to subsections 3A to 3D below, the existence and significance of evidence which was not heard at the original proceedings; and (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned."

204. It can thus be seen that a "miscarriage of justice" for the purposes of a fresh evidence appeal in Scotland includes the case where the jury's verdict is one "which no reasonable jury, properly directed, could have returned". That is of course a category 2 case. Section 106(3) is thus an example of the expression "miscarriage of justice" being used in a very similar context to that with which we are concerned.

205. It has been suggested that to include category 2 within the test of miscarriage of justice in section 133 would cause difficulties of application. For my part, I would not accept that suggestion. It is a test used at the end of the prosecution case in countless criminal trials in England and Wales. Moreover, it is used in the Court of Appeal in England and Wales. While it is not the question for decision in an English appeal because the question is now simply whether the conviction is safe, it is plainly relevant when a retrial is sought. The Court of Appeal would not make an order for a retrial if it formed the view that the effect of the new or newly discovered evidence led to the conclusion that no reasonable jury, properly directed, could convict. Moreover, so far as I am aware, this test has caused no difficulty in criminal appeals in Scotland.

206. It is a test which is familiar to the criminal trial and appeal process, which the proposed test of innocence is not. As Lord Hope has observed at para 95, in *R (Allen) (formerly Harris) v Secretary of State for Justice* [2009] 2 All ER 1 at para 40(iii) Hughes LJ said that cases where the innocence of the convicted defendant is genuinely demonstrated beyond reasonable doubt by the new or newly discovered fact the Court of Appeal will, in virtually every case, make that plain. However, that may not be the case and, as Lord Hope says, the Court of Appeal is not bound to say whether or not a defendant is innocent. In this regard there is authority for

the proposition that the Court of Appeal is neither obliged nor entitled to say whether an appellant is innocent: see *R v McIlkenny* (1991) 93 Cr App R 287 at 310-311. Whether that is correct or not, I agree with Lord Hope that, to put it no higher, it is at least questionable whether it can be right to restrict the entitlement to compensation to cases where the establishment of innocence is apparent from the Court of Appeal's judgment.

207. It is of interest in the context of this debate to note that it is common ground that it was only after the decision in *Mullen* that Secretaries of State have applied an innocence test and that they do not do so in Scotland even now.

208. It was suggested in argument that it is not appropriate for the Secretary of State, and not a court, to make judgments of this kind. However, section 133(3) expressly provides that the question whether there is a right to compensation shall be determined by the Secretary of State. Nobody has suggested that it is not appropriate for the Secretary of State to decide whether the claimant has proved that the new or newly discovered fact shows that he is innocent. It does not seem to me to be any less appropriate for the Secretary of State to decide whether he has proved that it shows that no reasonable jury could have convicted him.

209. In reaching his or her conclusion the Secretary of State is of course bound to have regard to what the Court of Appeal which reverses the conviction has said. In *In re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289 Lord Bingham said at para 16, albeit in the context of a claim under the ex gratia scheme, that the Secretary of State must properly be guided by the judgment of the Court of Appeal. However, it seems to me that it is for the Secretary of State to have regard to all relevant material when deciding whether the claimant has established beyond reasonable doubt that, in the light of the new or newly discovered fact, no reasonable jury, properly directed, could have convicted him. I see no reason why the Secretary of State could not decide that question, whether on the grounds of innocence or otherwise.

210. As I see it, the matter has to be tested as at the date of the reversal, having regard both to the evidence that was available at the trial and to the new or newly discovered facts. I would include in the evidence available at the trial, all such evidence, not just that adduced on behalf of the prosecution, but also that adduced during the defence case. I would therefore include admissions made by the defendant in cross-examination in a case in which the new evidence showed that the case should have been stopped. The question is whether, on that material, he had a case to answer or, put another way, whether a reasonable jury properly directed could have convicted him. If he proves beyond reasonable doubt that the answer to those questions is no, he is in my opinion entitled to compensation under section 133 on the basis that there has been a miscarriage of justice.

211. I entirely accept that the cases in which compensation can be claimed are limited by the necessity to satisfy the criteria in the section and by the need to show beyond reasonable doubt that the new or newly discovered fact demonstrates, in the light of the other material before the court that no reasonable jury, properly directed, could have convicted him. The Secretary of State would of course have to be satisfied that the alleged fact was indeed a fact.

212. I should add by way of postscript that, as I see it, category 2 potentially includes a case where the new or newly discovered fact is such that, if it had been known at the trial, the trial judge would have stopped the trial on the ground of abuse of process. If the Court of Appeal concluded that a new trial could not properly be ordered on the basis that it was not possible to cure the abuse, so that no reasonable jury, properly directed, could convict, there would, in my opinion have been a "miscarriage of justice" within section 133. It seems to me that this must be within the kind of miscarriage of justice which Lord Bingham had in mind in *Mullen*, namely where a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who certainly should not have been convicted.

213. Since *Mullen*, some doubt has been expressed as to whether the basis upon which it was decided is correct. See, for example, *R (Siddall) v Secretary of State for Justice* [2009] EWHC 482 (Admin) per Leveson LJ at paras 47-48. The basis on which it was decided by the majority, comprising Lord Bingham, Lord Scott, Lord Rodger and Lord Walker was that Mr Mullen's conviction had been reversed by the Court of Appeal on the ground that there had been an abuse of executive power and not any failure in the trial process: see per Lord Bingham at para 8, Lord Scott at para 65, Lord Rodger at para 69 and Lord Walker at para 70. In particular, Lord Bingham said that it was for failures in the trial process that the Secretary of State is bound by article 14(6) and section 133 to pay compensation. He distinguished those from abuse of executive power. He did so by reference to *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 per Lord Griffiths at pp 61-62 and *R v Looseley* [2001] 1 WLR 2060 at para 40. Lord Scott said that the Court of Appeal had not reversed the conviction because there had been any failure in the trial process but because, prior to the commencement of the trial process, there had been serious abuse of executive power which had led to the removal of the claimant from Zimbabwe to this country and thus enabled the trial to take place.

214. Although Leveson LJ observed that this distinction has its difficulties and noted that Lord Steyn said at para 57 that, if that abuse had been disclosed the trial would have been stopped, and in its written submissions Justice suggested that *Mullen* might now be decided differently on its facts.

215. There is I think scope for argument in the future as to whether there is a class of cases in which the section would not apply, of which *Mullen* is an example. They are cases in which it has been held that the trial should not be permitted to proceed, not because of anything related to the case against the defendant, but because to permit it would offend against the rule of law or would seriously affect the integrity of the administration of justice. In quashing Mullen's conviction Rose LJ, giving the judgment of the Court of Appeal, said at [2000] QB 520, 535-536:

> "This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the IRA and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which, as appears from *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 and *R v Latif* [1996] 1 WLR 104, very considerable weight must be attached."

It appears to me to be at least arguable that such a case would not fall within section 133. None of the cases before the Court in these appeals is such a case.

216. I recognise that Lord Phillips rejects category 2 as a test and that he has suggested an alternative test. However, section 133 inevitably requires the Secretary of State to consider the effect of the new or newly discovered fact upon the other evidence before the court and thus on the validity of the conviction. This involves the evaluation of the evidence in its legal context. It also expressly requires the Secretary of State to decide whether in the light of all the evidence the claimant has shown beyond reasonable doubt that there has been a miscarriage of justice. In considering all these questions, the Secretary of State can of course always take such advice as is appropriate. I remain of the view that category 2 is an appropriate formulation of the test and that the position is or should be as stated above. Compensation is only payable where, in the light of the new or newly discovered fact, no reasonable jury, properly directed, could have convicted or, subject perhaps to the point made in para 215 above, where the new or newly discovered fact would have led the judge to stop the case on the ground of abuse in the trial process.

217. However, I recognise that Lord Phillips suggests replacing the category 2 test with a more robust test. It is that 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. I have assumed that the second "it" means the evidence against the defendant. To my mind that test is consistent with the category 2 test identified above because, in such a case, no reasonable jury properly directed, could convict the defendant. For that reason and on that basis, I would accept the proposed test, with which Lord Hope, Baroness Hale and Lord Kerr agree.

Category 3 – unsafe conviction

218. Section 2(1) of the Criminal Appeal Act 1968, as substituted by section 2(1) of the Criminal Appeal Act 1995, provides that the Court of Appeal shall allow an appeal if they think the conviction is unsafe. The proviso in the previous section 2(1) was repealed. Mr Owen submitted that where a qualifying appeal is allowed on the basis that the claimant has shown beyond reasonable doubt that the conviction was unsafe because of a new or newly discovered fact, it follows that there was a "miscarriage of justice" within the meaning of section 133.

219. It is certainly possible to construe the expression "miscarriage of justice" as wide enough to include such a case. I do not however think that Parliament can have intended the expression to have such a wide meaning in section 133(1) because it would have been easy for the section to have been drafted in such a way as to include every case where the relevant appeal was allowed on the basis of a new or newly discovered fact. Moreover none of the courts which have considered section 133 have suggested that it might have such a wide meaning: see the cases referred to by Lord Hope at para 82.

220. In particular, the formulation of the test by Lord Bingham in *Mullen* does not encompass every case where the conviction was held to be unsafe on the basis of new evidence. His formulation was that there is a "miscarriage of justice" where a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who certainly should not have been convicted. It is not possible to say that, merely because a conviction has been quashed because it was unsafe, the appellant should not have been convicted. A conviction may be unsafe because the Court of Appeal concludes that, but for the successful ground of appeal, the jury might not have convicted. Indeed, this is by far the most common case in which an appeal is allowed. It is a category 3 case in which, as Dyson LJ put it in the passage quoted above, a fair-minded jury might convict or might acquit.

221. In such a case I do not think that one can say as a matter of course that the defendant should not have been convicted. It seems to me that it is only in a category 2 case (which of course includes a category 1 case) that it can be said that a person should not have been convicted. It can be so held in such a case because it follows from the conclusion that no reasonable jury, properly directed, could have convicted the defendant that he should not have been convicted. Any lesser test is to my mind too uncertain and would not satisfy the statutory test that, in order to be entitled to compensation, the claimant must prove beyond reasonable doubt that there has been a "miscarriage of justice". If he might have been convicted by a jury on all the evidence including the new or newly discovered fact, he cannot show for sure that there has been a "miscarriage of justice" within section 133(1).

Retrial

222. Section 133(5A) was not part of section 133 when *Mullen* was decided. It makes it clear that, where the claimant succeeds on appeal but is convicted at a retrial, he is not entitled to compensation because his conviction has not been "reversed". If his appeal succeeds and the Court of Appeal orders a retrial, but the prosecution decides not to proceed with the retrial, the conviction is treated a "reversed" when it so indicates. In these circumstances, the position is as described above.

223. If a retrial takes place and the claimant is acquitted of all offences at a retrial, there is scope for debate as to the position. By subsection (5A) the conviction is treated as "reversed" when he is so acquitted. It is not necessary to decide this question in this appeal but it is my provisional view that the same approach as described above would apply. Thus, in order to be entitled to compensation, he would have to prove beyond reasonable doubt that on the basis of the new or newly discovered fact no reasonable jury would have convicted him.

New or newly discovered fact

224. The question is what is meant by a new or newly discovered fact. In particular the question is what is meant by a newly discovered fact. Mr Tam QC submitted that a fact which was known to the prosecution and knowable to the defence because it was available to them, but which they did not know because they did not take the steps they should have taken to examine the evidence was not a newly discovered fact. I would not accept that submission. If the fact was not in fact discovered at or before the trial or at an in time appeal but was discovered thereafter, it follows that it was a newly discovered fact. The question is whether it was discovered earlier, not whether it was discoverable earlier.

225. In my opinion the fact that it was discovered by the prosecution before the appeal is irrelevant. In neither of the appeals before the Supreme Court were the relevant facts discovered by the defendants or their lawyers at or before the trial or the in time appeal. It follows that they were newly discovered facts. The fact that in the *Adams* case they were discoverable by the defendant's lawyers is irrelevant. As I see it, therefore, on the facts of these appeals this part of the test is satisfied.

226. However, there was much debate as to whether it is possible for a fact to be a newly discovered fact if it was known to the defendant's lawyers. In my opinion it is. Section 133(1) is subject to the proviso "unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted". The proviso does not apply if the non-disclosure of the fact was attributable to his lawyers. It could have done so. As Dyson LJ explained at paras 14-16 of his judgment, there is no mention of the convicted person's legal advisers in article 14(6) or section 133, whereas article 14(3) does refer to legal advisers. Moreover, there is no suggestion that "the person convicted" in section 133(1) includes his lawyers. In my opinion the Court of Appeal correctly held that knowledge of the fact by the defendant's lawyers would not prevent it being a newly discovered fact.

227. I note in this regard that in a case where the fact was known to the defendant's lawyers and not used at the trial, the failure to use it would be very relevant to the question whether the evidence of the fact would be admissible under section 23 of the Criminal Appeal Act 1968. It might well be held that in the light of the fact that the lawyers failed to deploy it, it was not "necessary or expedient in the interests of justice" to admit it on an appeal. In that event the appeal would not be allowed or the conviction reversed on the basis of it.

228. The remaining question is whether it is possible for a fact to be a newly discovered fact if it was known to the defendant himself at trial or at an in time appeal. The Court of Appeal held that it was, for the reasons given by Dyson LJ at paras 14 to 18. I agree. Section 133(1) contains the proviso "unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted". This proviso would not be necessary if the question whether evidence was new or newly discovered were tested by reference to the knowledge of the convicted person himself. The proviso seems to me to assume that a fact may be newly discovered even though it is known to the defendant at the relevant time. Otherwise it would have very little effect because it would only apply where the defendant did not know the fact but its non-disclosure was attributable to him. Such a situation is perhaps theoretically possible but the natural meaning of the proviso is that it covers the case where the defendant is aware of the fact at the relevant time but does not deploy it either personally or through his lawyers. So understood, the proviso seems to me to point to the conclusion that a fact may be a newly discovered fact even if it was known to the defendant himself at trial or at an in time appeal.

229. For these reasons I agree with Lord Hope's conclusion at para 107 and Lord Phillips' conclusion at para 62 that the relevant knowledge is that of the trial court, but do not agree with Lord Hope's conclusion, also at para 107, that material disclosed to the defence by the time of the trial cannot be said to have been newly discovered when it is taken into account at the stage of the out of time appeal. For the reasons given earlier, it is my view that material that was not discovered either by the defendant or his lawyers but was discovered only after the in time appeal was "newly discovered" on the simple basis that, whether or not it ought to have been discovered, it was not in fact discovered. That was the position in both the *Adams* appeal and the Northern Irish appeals.

Article 6(2) of the European Convention of Human Rights

230. Other members of the Court have considered the issues under this head in some detail. The European Court of Human Rights ("ECtHR") has applied article 6(2) in cases which are not covered by its language. For my part, I do not think that this is a case in which it is necessary or would be appropriate to analyse that jurisprudence in detail. I will only say that I am not at present persuaded that article 14(6) and section 133 are a form of lex specialis to which article 6(2) can never be relevant. For present purposes I shall simply assume that it is in principle possible for article 6(2) to apply to proceedings under section 133.

231. I can see that it is inappropriate, to put it no higher, to impute criminal liability to a person who has been acquitted. In each of the cases in which a claim for compensation arises under section 133(1) the claimant's conviction has been reversed by the Court of Appeal in an out of time appeal. Section 2(3) of the Criminal Appeal Act 1968 (as substituted in 1995) provides:

> "(3) An order of the Court of Appeal quashing a conviction shall, except when under section 7 below the appellant is ordered to be retried, operate as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal."

Thus the effect of the reversal of the conviction by the order of the Court of Appeal quashing it, is that the person concerned is formally acquitted.

232. In these circumstances 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. If the analysis set out above is adopted, there is no risk of its doing so. The question in each case is whether the claimant has proved beyond reasonable doubt that the new or newly discovered fact has 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 does not in any way affect or impugn the acquittal of the claimant as provided by section 2(3) of the Criminal Appeal Act 1968 quoted above.

233. The question at such a trial is different and so is the burden of proof. The position is not unlike a civil process where a claimant seeks damages from a defendant who has been acquitted of, say, causing grievous bodily harm to A at a criminal trial. Under English law it is permissible for A to seek damages from the defendant on the ground that he was unlawfully injured by him, alleging all the same facts as had been relied upon at the criminal trial. The critical difference between the two processes is that at the criminal trial the prosecution has to prove guilt beyond reasonable doubt, whereas at the civil trial A only has to prove liability on the balance of probabilities.

234. The ECtHR has expressly recognised that civil proceedings of that kind do not infringe article 6(2) of the Convention: see eg *Y v Norway* (2003) 41 EHRR 87, where the court expressly said at para 41 that, while the acquittal from criminal liability ought to be maintained in 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. It did add in para 42 that, if the national decision on compensation contains a statement imputing the criminal liability of the respondent party, this could raise an issue falling within the ambit of article 6(2) of the Convention. See also *Bok v The Netherlands*, (Application No 45482/06), 18 January 2011.

235. Similarly, here, where, at any rate on the analysis set out above, there is no question of anything said or done in the section 133 proceedings impugning the acquittal in the criminal proceedings, I see nothing in article 6(2) which is in any way inconsistent with the conclusions I have reached.

Disposal

236. I agree with Lord Phillips, Lord Hope, Baroness Hale and Lord Kerr that the appeal in the *Adams* case must be dismissed. Lord Phillips has set out the relevant facts. As Dyson LJ observed at para 59, the Court of Appeal allowed the appeal because the undeployed material was important and might have led the jury to acquit. The decision to quash the conviction was founded on the potential that the undeployed material had for affecting the jury's verdict. It was thus a category 3 case and, for the reasons given earlier, section 133(1) does not cover such a case.

237. I also agree that the appeals in the Northern Irish cases should be allowed. Lord Kerr has set out the facts in some detail. They show, at any rate to my mind, that, in the light of the newly discovered facts, no reasonable jury, properly directed, could have convicted them.

DISSENTING JUDGMENTS

LORD JUDGE

The legislation

238. Section 133(1) of the Criminal Justice Act 1988 ("section 133") provides:

> "…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."

"Reversed" refers to a conviction which is quashed on an appeal out of time or following a reference by the Criminal Cases Review Commission (section 133(5)).

239. By section 133(2) compensation is not payable unless the application for compensation has been made:

> "Before the end of the period of 2 years beginning with the date on which the conviction…is reversed or he is pardoned."

This limitation was inserted by sections 61(1)-(3) and (9) of the Criminal Justice and Immigration Act 2008 and came into force on 1 December 2008. Simultaneously, in accordance with section 61(1), (2), (5) and (9) of the 2008 Act, provision was made for the cases where the conviction is quashed on an appeal out of time, and a retrial ordered, so that:

> "The conviction is not to be treated…as "reversed" unless and until the person is acquitted of all offences at the retrial or the prosecution indicates that it has decided not to proceed with the retrial." (Section 133(5A))

240. The determination whether there is an entitlement to compensation is vested exclusively in the Secretary of State, (section 133(3)) who in exceptional circumstances may extend the time for making an application. (section 133(2A))

241. When section 133 was enacted an ex gratia system operated in tandem with it. In England and Wales and Northern Ireland, but not in Scotland, the ex gratia scheme was abolished in 2006. In his article "Compensation for Wrongful Imprisonment" [2010] Crim LR 805, Professor John Spencer QC convincingly criticised the narrowness of and consequent anomalies which arise from the limitations of the statutory scheme. No alternative remedy is provided unless, perhaps, and subject to limitation periods, where malpractice in the investigative process is established, the victim may pursue a remedy in tort, or when the individual suffered a wrongful conviction as a consequence of negligence by his legal advisors, a claim in damages may be available. In short, the statutory scheme does not preclude any relevant action which may, in theory, be available in tort, but it is in any event unsupported by the ex gratia scheme. Nevertheless we must analyse section 133 and the ambit of the scheme for the payment of compensation without reference to its anomalies and disadvantages.

242. When it was examined by the House of Lords in *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1 the meaning and effect of section 133 produced contradictory opinions with no authoritative decision. Lord Steyn concluded that the statutory scheme was confined to cases where "the person concerned was clearly innocent". Lord Bingham of Cornhill, while agreeing with the result, for carefully explained reasons, hesitated to accept this restriction on the ambit of the statutory scheme. The differences between their respective approaches to the problem have been considered and examined in a number of subsequent decisions, of which the most recent is *R (Allen (formerly Harris) v Secretary of State for Justice* [2009] 1 Cr App R 36. They must finally be resolved now. As we are not agreed, without embarking on what would be a repetitious discourse of much of the voluminous material drawn to our attention, I shall briefly explain the reasons why I agree with Lord Steyn.

243. In *Mullen* the parties were agreed that the interpretation of section 133 required what was described as a "correct understanding of article 14(6)" of the International Covenant on Civil and Political Rights, dated 16 December 1966. ("ICCPR") That view was adopted by the House of Lords and it is unchallenged in the present proceedings.

244. Article 14(6) provides:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the grounds 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."

In short, the enactment of section 133 in virtually identical terms represented the response of the United Kingdom to a Treaty obligation.

245. One further Treaty provision needs immediate attention. In November 1984 article 3 of Protocol 7 to the Convention of Human Rights also made what was effectively an identical provision to article 14(6) of the ICCPR.

> "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".

Article 3, Protocol 7 will become relevant when the jurisprudence of the European Court of Human Rights falls to be considered.

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. I must therefore address some of the contentions which suggest that this construction is over restrictive.

The "unsafe" conviction

250. Mr Tim Owen QC highlighted the absence of word "innocent" from section 133. The omission reflects not only the autonomous concept of "miscarriage of justice", but more significantly, the absence of an "innocent" verdict in the

criminal justice process. The defendant is either proved to be guilty of the crime alleged, or he is entitled to a "not guilty" verdict and acquittal. A verdict of "innocent" is unknown. On acquittal, or the reversal of a conviction, the presumption of innocence revives. It applies when the jury considers that there is a high probability that the defendant is guilty, and indeed to cases like Mullen, whose conviction was quashed notwithstanding the assessment of the court that he was undoubtedly guilty. Just because it is a concept to which the criminal justice process is not directed, the word "innocent" could have no place in section 133.

251. The only ground for quashing a conviction in the Court of Appeal Criminal Division (the Court) is that it is "unsafe". There are however occasions when a new or newly discovered fact may well demonstrate the factual innocence of the appellant. And if it does, the judgment of the court may say so. I respectfully disagree with the observation in *R v McIlkenny* (1991) 93 Cr App R 287 that the court is not "entitled" to state that an appellant is innocent. The processes of the Court of Appeal do not allow for a formal declaration of factual innocence, any more than the trial process recognises a verdict of "innocent". However there can surely be no stronger case for doubting the safety of a conviction than evidence which unmistakenably demonstrates that the appellant is in truth an innocent man or woman. (See *R v Fergus* (1994) 98 Cr App R 313: *R v Hodgson* [2009] EWCA Crim 490.) Although the conviction is quashed not on the ground that the defendant is "innocent", but because his conviction is "unsafe", the terms of the judgment should conscientiously reflect the true reasons for its decision that the conviction should indeed be quashed as "unsafe".

252. At the risk of stating the obvious, the decision whether to quash a conviction is for the Court: so are all features of the trial process, and indeed any order for retrial. If the end of the judicial process is that the conviction is quashed, or if following a retrial, the defendant is acquitted, the administrative decision whether compensation is payable for a miscarriage of justice is vested exclusively in the Secretary of State. The determination is not limited to some kind of administrative assessment of the circumstances in which the judicial process has come to an end. Therefore while the Secretary of State should pay the closest possible attention to the terms of the judgment of the Court, whatever the terms in which the judgment is expressed, when making the decision whether a miscarriage of justice has occurred, he is not confined to the judgment of the Court.

Retrial

253. The circumstances in which a retrial will be ordered following the quashing of a conviction vary enormously. The single question is whether in a fact specific context the interests of justice should lead to such an order. Dealing with it generally it is most unusual for an order for retrial to be made many years after

conviction, or when the sentence imposed at the original trial has been or is close to being completed. On the other hand, again dealing with it generally, where a conviction is recent, and the sentence substantial, and the evidence relied on the prosecution is likely to be available at the retrial, then a retrial may well be ordered. Exceptions can be found both ways. At the risk of repetition, the decision is fact specific. It can however be confidently stated that it would be inconceivable for the Crown to seek or the Court to order a new trial if it were made clear in the terms of the judgment that the conviction was being quashed on the basis that the fresh evidence demonstrated that the defendant was innocent. This reinforces my view that if that conclusion is justified, the court is entitled to say so in its judgment.

254. These considerations bring me to section 133(5A). This subsection addresses the newly introduced statutory time limit in which an application for compensation may be made in the context of an order for retrial. If for any reason (including the conclusion of the Court that the defendant is truly innocent) no order for retrial is made, time runs from the date when the conviction is quashed. If however (again, for whatever reason) the order quashing the conviction is accompanied by an order for retrial, notwithstanding the presumption of innocence, for the purposes of the scheme for the payment of compensation the conviction is not reversed or quashed and the time for making an application is accordingly postponed until the retrial process is completed. This enables first, the defendant to concentrate his attention on the forthcoming retrial. Second, it is conclusive of the question (adversely to the defendant) if he is convicted, when his position is exactly the same as it would have been if the original conviction had not been quashed. Third, if he is acquitted, the process may provide the Secretary of State with further material on which to base his determination. In my judgment section 133(5A) has no bearing on the proper construction of the words "beyond reasonable doubt that there has been a miscarriage of justice", and the entitlement to compensation under the statutory scheme was not expanded with effect from 1 December 2008 when section 133(5A) came into force. That was not the purpose of this new inserted provision which was directed to the consequences of the introduction of the new timetable within which applications should be made. It was procedural only.

European Court of Human Rights

255. In my judgment the jurisprudence of the European Court of Human Rights drawn to our attention by Mr Owen does not bear on the issues which arise in this litigation. As already indicated once a conviction has been reversed the presumption of innocence applies. Subject only to the provisions of sections 76-83 of the Criminal Justice Act 2003 the rule against double jeopardy applies and the defendant cannot be prosecuted a second time for an offence of which he has been acquitted, or when his conviction has been reversed and for the purposes of the

administration of criminal justice the prosecution process is at an end. Nevertheless the acquittal, or the successful appeal against conviction, does not operate as an absolute bar to litigation. It remains open to any individual to assert that notwithstanding the acquittal or quashing of the conviction, the defendant was guilty. That is what Lord Steyn said about Mullen in his judgment in that case. A defendant who has been acquitted of rape may face proceedings for damages by the complainant and she may successfully establish on the balance of probabilities that he did indeed rape her and is liable in damages. In proceedings for defamation on the basis that the defendant's innocence is questioned, the acquittal does not create an irrebuttable presumption that the assertion cannot be justified and must be unjustifiable.

256. Article 3, Protocol 7 forms part of the Convention. It must be read together with the Convention. The jurisprudence of the European Court of Human Rights relied on by Mr Owen was not directed to and did not address the provisions of article 3, Protocol 7. If the decisions he relied on apply in the present case it will in effect mean that the reversal of the conviction carries with it an obligation to pay compensation in accordance with section 133, although such a conclusion would be inconsistent with the wording of article 3, Protocol 7 itself. *Bok v The Netherlands* (Application No 45482/06) (unreported) 18 January 2011 confirms that it does not.

257. Section 133 therefore provides an individual whose conviction has been reversed with the opportunity (but no obligation) to make a claim for compensation based on a statutory test which is effectively identical to the provisions of the European Convention. The Secretary of State must allow or reject the application in accordance with that test.

Conviction Impossible

258. This heading is used to encompass some of the alternative ways of approaching the concept of miscarriage of justice adopted in the majority judgments which have reached the conclusion that the phrase has a rather broader ambit than I do.

259. A newly discovered fact which demonstrates that the prosecution against the defendant is shredded to the extent that no conviction could have been based on it, or that no evidence would properly have been offered or, if there had been a trial, there would have been no case to answer at the close of the prosecution case, is likely to provide powerful material which may lead the Secretary of State to conclude that the defendant is indeed innocent. However that conclusion does not automatically follow, and unless it does, section 133 does not apply. In short, these

considerations are of evidential significance, maybe of crucial evidential significance, but not determinative.

260. There are a variety of different circumstances in which the Court may make a decision on appeal in relation to decisions at trial that what appeared to be powerful evidence for the Crown should have been excluded. For example, in the light of some newly discovered fact the Court may conclude that the decision of the trial judge to allow crucial prosecution eye witnesses to give their evidence anonymously was wrong, or no longer tenable: without that evidence there would be no case against the defendant. The Court may order a retrial, but without the protection of an anonymity order, the crucial witnesses may then refuse to give evidence at all. Accordingly no further evidence would be offered against the defendant. In my judgment it should not, and it would not, follow that the defendant would be entitled to compensation. Similar considerations would arise if, on the basis of fresh evidence, the Court concluded that the judge had wrongly admitted crucial hearsay evidence without which there would have been no prosecution.

261. Taking the matter further, *R v Smith* [1999] 2 Cr App R 238 illustrates the difficulty of equating the "no case to answer" situation with the concept of miscarriage of justice within section 133. The judge rejected a submission that there was no case to answer. The Court concluded that he was wrong and went on to examine the question, "what if a submission is wrongly rejected but the defendant is cross-examined into admitting his guilt?" It concluded that the conviction would still be unsafe because the defendant was entitled to be acquitted at the close of the prosecution case. It would be surprising if notwithstanding his own sworn admission of guilt, the discovery of a new fact which demonstrated that the decision that there was a case to answer was wrong, should be followed by the payment of compensation. Again, where fresh evidence is advanced on behalf of the appellant which undermines the safety of the conviction, and indeed puts into question a substantial part of the prosecution's case, the prosecution may seek to adduce fresh evidence demonstrative of guilt. The jurisdiction to permit the Crown to do so is available (for example, see *R v Hanratty* [2002] EWCA Crim 1141; [2002] 3 All ER 534). In the interests of justice the Court may order a new trial to enable all the issues to be resolved by a jury notwithstanding that, standing on its own, the original evidence advanced by the Crown was no longer sufficient to found a case for the appellant to answer.

262. Finally, I must return to *Mullen* itself, which at [1999] 2 Cr App R 143 sets out the reasons why the conviction was quashed. The matters which constituted the abuse of process occurred before Mullen was returned from Zimbabwe to this jurisdiction. The British authorities procured his deportation by unlawful means, "in breach of public international law". The prosecution itself was held to be "unlawful". Mullen therefore should not have been charged, let alone prosecuted

to trial. Yet the House of Lords was agreed that he was not entitled to compensation, and I wholeheartedly agree.

263. Considerations like these underline some of the practical difficulties with any approach to the construction of section 133 which goes beyond the limits suggested by Lord Steyn in his judgment in *Mullen*, that compensation within the statutory scheme is payable only when the defendant was convicted of an offence of which he was truly innocent, and therefore beyond reasonable doubt the victim of a miscarriage of justice. In my judgment the principle is that section 133 is concerned with the fact rather than the presumption of innocence in the context of the administrative decision to be made by the Secretary of State. It is not related to different (and if so which?) aspects of the trial processes, or the likely or possible impact which the new or newly discovered fact would have had on the decision to prosecute or on the forensic processes which culminated in conviction.

264. Their practical effect is demonstrated in the case of MacDermott and McCartney. The confessions on which the prosecution relied would have been inadmissible if they had been made not as a result of violence, but rather of inducements. Assuming for present purposes that the newly discovered material demonstrated that Donnelly had been offered identical inducements to those which MacDermott and McCartney had asserted at their trials, their convictions would have been no less liable to be quashed than they were in the light of the fresh evidence relating to police violence. As there was no evidence beyond their inadmissible confession there would have been no basis for any prosecution. And there would, if they were prosecuted, have been no case for either to answer. Yet, in the context of an inducement or inducements, there might, if the confessions were sufficiently detailed, be no reason to doubt that the confessions were true, even if inadmissible. In my judgment their cases would not qualify for compensation.

265. We are here dealing not with inducements which cast doubt on the voluntariliness of the confessions, but with violence. The newly discovered material would have borne on the decision of the trial judge whether the defendant's confessions were voluntary or not. The fresh evidence led the Court of Appeal in Northern Ireland to conclude that if it had been available at trial there was a realistic possibility that the evidence of the police officers (who asserted that there had been no intimidation of the defendants, and no grounds for doubting that the confession statements were voluntary) may have been discredited. If so the statements would have been excluded from consideration, and there would then have been no prosecution and no case for either of them to answer. In principle, however, the impact on the admissibility of their confessions would have been the same, whether they responded to inducements to confess or succumbed to violence. Although I share the "distinct unease" of the Court of Appeal in Northern Ireland about the circumstances in which the confessions were made by the

appellants, it does not follow that the Secretary of State was obliged to conclude that they were "innocent" for the purposes and within the ambit of section 133.

"New" or "newly discovered" fact

266. In the discussion about the meaning of "new" or "newly discovered" fact the rival contentions went too far. It would be unrealistic, and removed from the realities of the conduct of the defence at trial that his legal advisers should inform the defendant personally of each and every fact and matter to which their attention is drawn by the prosecution. When all is said and done, the defence advocate is not a mouthpiece or echo chamber for his client. The responsibility for giving advice and assisting the defendant to make whatever decisions which he must make for himself is one aspect of the responsibilities: the deployment of evidence and argument on his behalf is another. Sometimes the lines overlap, but often they do not. It therefore follows that merely because the defendant himself is personally ignorant of a particular fact, it is not "new" or "newly discovered" when the defendant personally ceases to be ignorant of it. On the other hand, when the prosecution has complied with all its obligations in relation to disclosure of material to the defence lawyers, and they, for whatever reason, do not then deploy material which appears to be adverse to the prosecution or which would assist the defendant, that material should not automatically be excluded from the ambit of the section on the basis of prosecutorial compliance with its disclosure obligations. Rather the approach should coincide with the circumstances in which fresh evidence is sought to be deployed before the Court in accordance with section 23 of the Criminal Appeal Act 1968. This normally predicates that there should be a reasonable explanation for the earlier failure to adduce the evidence at the trial.

267. In the present case, it is clear from the judgment of the Court in *Adams* that the conviction was quashed on the basis of fresh evidence in circumstances in which, notwithstanding that the prosecution had fully performed its responsibilities in relation to disclosure, Adams's legal team had failed adequately to respond and fulfil theirs. In my judgment that failure or omission was a new or newly discovered fact within the ambit of section 133.

Conclusion

268. In my judgment the appeal of *Adams* should be dismissed: as to the appeals of *MacDermott* and *McCartney*, I should have agreed with Lord Brown's proposal that they should be remitted to the Secretary of State for further consideration.

LORD BROWN (with whom Lord Rodger agrees)

269. I have had the advantage of reading in draft the judgment of Lord Judge, the Lord Chief Justice, and, agreeing with it as I do, I shall try not to repeat the bulk of its reasoning. So troubled am I, however, that apparently ours is the minority view on these appeals that I wish to add some additional thoughts of my own.

270. That section 133 of the Criminal Justice Act 1988 was intended to give effect to the United Kingdom's international obligation under article 14(6) of the International Covenant on Civil and Political Rights 1966 is, of course, plain and obvious. Section 133(1) omits the phrase in article 14(6) "by a final decision" – reflecting it instead in the definition of "reversal" in section 133(5) by referring there to "an appeal out of time" or "on a reference" – and substitutes for the word "conclusively" in article 14(6) the hallowed expression "beyond reasonable doubt". Otherwise the language of the two provisions is virtually identical. It is clear, therefore, that the right to compensation arises only when each of four conditions is satisfied: (i) the conviction is quashed on an appeal out of time or a reference (not, therefore, when a timeous appeal succeeds, nor, of course, on an acquittal at trial); (ii) the appeal succeeds on the ground of a new or newly discovered fact; (iii) the appellant was in no way responsible for the previous non-disclosure of that fact; and (iv) that fact shows beyond reasonable doubt that there has been a miscarriage of justice.

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.

272. Before turning more particularly to whether it is the right construction, it is I think worth pointing out too that the provision whereby those benefiting from article 14(6) are entitled to be "compensated according to law" similarly accords to individual states a wide discretion as to how such compensation is to be assessed. As to this the UK's approach seems to me notably generous. In reaching his assessment, the Secretary of State's assessor is directed to apply principles analogous to those governing the assessment of damages for civil wrongs – including, therefore, claims for wrongful imprisonment – although a deduction may be made on account of the claimant's criminal record. An illustration of the size of the awards liable to be made in these cases is provided by *R (O'Brien) v Independent Assessor* [2007] UKHL 10; [2007] 2 AC 312 – concerning compensation claims arising out of the wrongful conviction of the Hickey brothers and others for the murder of Carl Bridgewater at Yew Tree Farm. The first instance decision in that case – [2003] EWHC 855 (Admin) – shows net final compensation assessments there of £990,000 for Michael Hickey and £506,220 for Vincent Hickey (wrongfully detained in prison respectively for just under thirteen years and something under fourteen years – see para 8 of Lord Bingham's judgment in the House of Lords).

273. What, then, is the correct interpretation of "a miscarriage of justice" in section 133(1)? More particularly, is it:

(i) the conviction of an innocent defendant, or

(ii) the conviction of a defendant who, by a new fact, so undermines the evidence against him as to show that, on the undermined evidence, he could not possibly have been convicted – essentially Lord Phillips' (category 2) formulation (at para 55), apparently now subscribed to by the majority of the court.

274. I mention only those two possible constructions since no member of the court appears to favour any yet wider construction of section 133 so as to embrace also cases "where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant" (Lord Phillips' category 3 at para 9). Strikingly, and to my mind significantly, it was this wider construction that not just the appellants

but also Mr Alex Bailin QC for the Intervener, JUSTICE, were urging upon the court; indeed, both Mr Owen QC for Mr Adams and Mr Bailin expressly submitted that there was no logical or principled dividing line between categories 2 and 3. And to my mind they were right to do so. Of course, innocence as such (factual as opposed to presumptive) is not a concept known to the criminal law. But nor too, in the context of criminal appeals, is the notion of a prosecution case so undermined that no jury could possibly convict. The criminal court deals only in the safety of convictions. On a fresh evidence appeal the sole question the court asks itself is whether the conviction is unsafe (essentially the lurking doubt test). If the case is a difficult one it sometimes finds it helpful to test its view "by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict" – *R v Pendleton* [2001] UKHL 66; [2002] 1 WLR 72, 83, para 19. The ultimate and only question, however, is for the court: is the verdict unsafe? The question raised by section 133, by contrast, is not one for the criminal court but rather one entirely for the Secretary of State.

275. Similarly, no member of the court appears to suggest that *Mullen* itself was wrongly decided. Lord Steyn, of course, reached his decision there (to allow the Secretary of State's appeal and reinstate the decision of the Divisional Court) on the ground that section 133 compensates only those who are clearly innocent whereas Lord Bingham reached his on the altogether narrower ground that: "It is for failures of the trial process that the Secretary of State is bound . . . to pay compensation" (para 8). Mr Mullen's conviction was, of course, quashed not because of anything that had gone wrong in the trial process but because he would not have been on trial at all but for having been unlawfully returned to this country. Certainly Lord Bingham disagreed with Lord Steyn's approach. But it cannot be pretended that Lord Bingham's own approach supports the particular formulation suggested by the majority in the present case.

276. My own reasoning in the Divisional Court in *Mullen* [2002] 1 WLR 1857, 1864 was essentially that later to be adopted by Lord Steyn:

> "25 What was shown beyond reasonable doubt here was that there had been an abuse of process in bringing the claimant to trial. That was the 'newly discovered fact'. But that fact did not itself show beyond reasonable doubt that there had been a miscarriage of justice. All that it showed was that the court needed to conduct a 'discretionary exercise' to decide in effect which of two important public interests should prevail: the public interest in trying, convicting and punishing the guilty or that in discouraging breaches of the rule of law and preserving the integrity of the criminal justice system. It preferred the latter. True, it had 'no doubt' that the balance came down 'decisively' in the defendant's favour. But that was by no means to find that he was innocent, still less that he was plainly

> so. Rather it was a judgment that the lawful administration of justice would be affronted by his remaining convicted and imprisoned.
>
> 26 In short, a miscarriage of justice in the context of section 133 means, in my judgment, the wrongful conviction of an innocent accused. Compensation goes only to those ultimately proved innocent, not to all those whose convictions are adjudged unsafe. The quashing of the claimant's conviction in this case was a vindication of the rule of law, not the righting of a mistaken verdict."

As I shall come to suggest, the quashing of the conviction in many cases which would fall within the majority's formulation for compensation here is more properly to be characterised as "a vindication of the rule of law" than as "the righting of a mistaken verdict". Par excellence, indeed, this seems to me to be so in cases where confession statements, even though perhaps demonstrably true (by referring, say, to facts known only to the perpetrator of the crime) are excluded because of intimidation or inducement – see particularly in this regard paras 264 and 265 of Lord Judge's judgment.

277. My reasons for remaining precisely of the view I expressed in the Divisional Court in *Mullen* are essentially a combination of the considerations in favour of the category 1 test (that of innocence) and the considerations weighing against the category 2 test (that of critical evidence undermined). As for the factors favouring the test of innocence, it is difficult to improve upon those listed by Lord Phillips at paras 43-48 of his judgment. As Lord Phillips there points out, this construction "gives section 133 a perfectly natural and logical meaning, indeed it is the meaning that the man in the street would be likely to accord to the wording of section 133" (para 43); "it makes perfect sense of the requirement that the new facts should prove this beyond reasonable doubt" (para 44); and "it gives section 133 a meaning which is eminently practicable" (para 45). It seems to me unnecessary to decide whether Lloyd LJ was right to say in *R v McIlkenny* (1991) 93 Cr App R 287, 311 that the Court of Appeal is not "entitled" to state that an appellant is innocent – a point on which Lord Phillips (at para 45) and Lord Judge (at para 251) disagree. The all important consideration in this respect is, as Lord Phillips says, that it is for the Secretary of State, not the Court of Appeal, to decide whether there has in fact been a miscarriage of justice (and, therefore, on the innocence test, whether the fresh evidence shows beyond reasonable doubt that the defendant was innocent) and "the reasons given for quashing the conviction are unlikely to leave any doubt of this" (para 46). As, moreover, Lord Phillips observes (at para 47) the innocence test will ensure that a guilty defendant is not compensated for the consequences of his conviction. If I may revert to "the man in the street", he would, I think, be appalled at a construction which, on the contrary, would not infrequently result in the compensation of the guilty, sometimes, as already indicated, to the extent of hundreds of thousands of pounds.

278. As for the factors weighing against the category 2 test, prominent amongst these is undoubtedly the converse of the point just made, the fact that it would result in very substantial compensation for many defendants who are in truth guilty. I have already instanced (para 275 above and paras 264 and 265 of Lord Judge's judgment) those whose confession statements (even if true) come to be undermined. Equally this is so in cases where it comes to be seen that anonymous or hearsay evidence should not have been allowed (see particularly in this regard para 260 of Lord Judge's judgment). This point, indeed, can be illustrated by the facts of *R v Secretary of State for the Home Department, Ex p Bateman* (1994) 7 Admin LR 175 (where, as Lord Clarke notes at para 199, I was sitting in the Court of Appeal with Sir Thomas Bingham MR and Farquharson LJ). Mr Bateman's appeal for compensation failed in the event because the success of his second criminal appeal owed nothing to a "new or newly discovered fact". Obiter, however, the Master of the Rolls suggested that he had suffered a miscarriage of justice. On an appeal out of time his conviction had been quashed because certain statements had been wrongly admitted in evidence at trial. These were statements from important New Zealand witnesses whom he had wanted called and cross-examined. But why, I am now inclined to ask, should a successful appellant be compensated in those circumstances? The case against him might well have become more, rather than less, damning had the witnesses indeed been called and given their evidence orally (as was held should have happened).

279. One other case I want to mention which to my mind strikingly illustrates the dangers of adopting the category 2 construction is a recent decision of this court. The case concerned the conviction of each of two brothers (A and B) for murder and two robberies following, as later investigations and a reference by the Criminal Cases Review Commission were to show, police misconduct of the gravest kind (most notably by colluding with the main prosecution witness). On a second appeal some twelve years after conviction there was accordingly no dispute but that A's and B's convictions had to be quashed. The only issue for the Court of Appeal had been whether A should be retried, this time not on the basis of the irredeemably tainted evidence given at his original trial but rather based on a series of admissions of guilt he had made following his conviction and the failure of his first appeal. Because the decision – upheld by the majority in this court – was to order a retrial, the reporting of the detailed judgments both of the Court of Appeal and of this court has had to be delayed. As, however, these judgments make plain, although B could not be retried (he having made no confession of guilt), the guilt of both was in reality plain. True, the most critical evidence in the case against them had been that of a supergrass (without whose evidence, indeed, it was agreed that there could have been no prosecution at all), upon whose evidence the Crown could no longer rely because of the police's misconduct in conferring upon him a whole host of benefits to secure his continuing cooperation in the brothers' prosecution at trial. But his evidence had been supported by a "jigsaw" of other pieces of evidence. That said, however, in the language of the majority's category 2 test, "no conviction could possibly be based upon it". Is it then to be said that B

must be compensated for the twelve years or so he spent in prison before being released at his second appeal? And, indeed, that A too would have had to be compensated had the Court of Appeal not decided to order his retrial? Will the Court of Appeal in future, when deciding at the conclusion of an out of time appeal whether the interests of justice require a retrial, have to factor in the consideration that, unless a retrial is ordered, the successful appellant will or may be found entitled to compensation under the majority's approach to section 133?

280. The other centrally important consideration militating against a category 2 construction of section 133 is the difficulty – indeed, to my mind, 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". It seems to me nonsensical to suggest that the category 2 test is one that can sensibly be satisfied (or not) beyond reasonable doubt. For good measure – although, I accept, less conclusively – the alternative basis of entitlement to compensation provided for by the section, namely a pardon, naturally connotes innocence rather than some less exacting test. Even the language of "a new or newly discovered fact" (rather than "fresh evidence") to my mind tends to suggest the revelation of something clear and certain – namely innocence, rather than merely the undermining of the prosecution's overall case. I entirely accept, of course, that a new fact which does so undermine this case as to show that the appellant could not properly have been convicted on the evidence in fact adduced against him may well in many cases suggest actual innocence and duly persuade the Secretary of State of this. Lord Judge expressly recognises this at para 259 of his judgment. But what if, say, as a result of inadmissible intercept evidence or other reliable intelligence the Secretary of State reasonably believes (perhaps, indeed, is convinced) that the appellant is in fact guilty. Must he nevertheless compensate him? I would hope and respectfully maintain not.

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? That, at all events, is the scheme which in my opinion Parliament enacted here.

282. On certain of the questions raised there is nothing I wish to add to what Lord Judge has said. I agree with him (at para 252) about the material to be considered by the Secretary of State (indeed, as to this, I agree too with what Lord Phillips says at para 36 of his judgment, subject only to applying the correct test). I agree with all that Lord Judge says (at para 254**)** as to the relevance here of section 133(5A). I agree with him too (at paras 255 and 256) about the relevance of the Strasbourg jurisprudence in this context. (It hardly needs pointing out that, were the Strasbourg cases to present a problem, they would do so no less for the majority than for the minority view.) And I agree with Lord Judge's approach (at paras 266 and 267) to "a new or newly discovered fact".

283. In common, as I understand it, with every other member of the Court, I too would dismiss Mr Adams's appeal. Had Lord Judge's and my view as to the meaning of section 133 prevailed, I would have been inclined to remit Mr MacDermott's and Mr McCartney's compensation claims to the Secretary of State for his further consideration in the light of our judgments and more particularly of Lord Kerr's masterly analysis of the facts of those two cases.

LORD WALKER

284. I agree with the judgments of Lord Judge and Lord Brown.