The Supreme Court determined that a ‘fresh approach’ was needed in an attempt to bring some clarity to the issue of the eligibility for compensation of those who have had their convictions quashed by the Court of Appeal. The definition that the majority agreed upon was 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’. This article argues that the judgment suffers from a failure to consider the purpose of the legislation; that it is unclear whether the test is normative or historical and that this presents a particular problem in cases relating to the Northern Ireland conflict. The Court focuses on the guilt of the appellant and excludes from its consideration any notion of culpability by the state, which is a cause for concern.

‘Miscarriage of justice’ is a nebulous term. It has long been recognised that it means different things in legal and lay terms, but its definition also alters depending on the stage of the legal process, as those who succeed in having their convictions overturned may not have suffered a miscarriage of justice according to the compensation scheme for such cases. The previous leading case on compensation, R (Mullen) v Secretary of State for the Home Department [2004] UKHL 18; [2005] 1 AC 1, further complicated matters by basing its unanimous decision on two conflicting opinions: the ‘narrow’ definition of Lord Steyn that a miscarriage of justice referred only to the conviction of the factually innocent; and the ‘wider’ definition of Lord Bingham which included cases in which something had gone seriously wrong with the trial process, resulting in an improper conviction. The cases that followed Mullen [4] had proceeded on the basis that neither test was satisfied. This approach was becoming difficult to sustain and the Supreme Court
in *R (Adams) v Secretary of State, Re MacDermott’s Application and Re McCartney’s Application* (Adams) determined that a ‘fresh approach’ was needed in an attempt to bring some clarity to the issue of eligibility for compensation under section 133 of the Criminal Justice Act 1988 (section 133).

Section 133 provides in almost identical terms to Article 14(6) of the International Covenant on Civil and Political Rights 1966 (ICCPR) and Article 3 of Protocol 7 to the European Convention on Human Rights (1984) (ECHR) that:

(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 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’ should be construed as referring to convictions quashed or set aside following an appeal made out of time, or on a reference from the Criminal Cases Review Commission (CCRC). That is, only ‘exceptional’ appeals may be entitled to compensation; appeals allowed at first instance cannot be considered. The categories eligible for the statutory provision are much more narrowly drawn than for the *ex gratia* scheme which section 133 first supplemented, then supplanted. A conviction is not to be considered reversed unless and until the person is acquitted of all offences at a retrial, or the prosecution indicates that it has decided not to proceed with a retrial.

**FACTS OF THE CASES**

The three appellants in these two conjoined appeals had had their convictions for murder quashed, with no orders for retrials being made, following references by the CCRC. Their respective claims for compensation were refused by the relevant Secretary of State, decisions that had been upheld on judicial review and appeal. The common issue that arose in relation to each appeal was the definition of ‘miscarriage of justice’ in section 133. In the case of Adams the meaning of ‘a new or newly discovered fact’ was also at issue.

Adams’s conviction in 1993 was founded on the evidence of a single witness, supported by that of two police officers. His conviction was quashed

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6 *ibid* at [35].
7 s 133(5), as amended by para 16(4) of schedule 2 to the Criminal Appeal Act 1995.
10 Subsection (5A) was inserted by the Criminal Justice and Immigration Act 2008, s 61(5).
in 2007, on the basis that a very late change of counsel meant that those representing him had failed to consider relevant unused material which would have provided valuable assistance in cross-examination. The Court of Appeal concluded that the jury might not have been satisfied of guilt had it heard this evidence, but made it clear that an acquittal would not have been inevitable had the failings on the part of the defence lawyers not occurred.12

McCartney and MacDermott were convicted by a jury-less Diplock Court in Belfast in 1979 of murder and other terrorism-related offences. The sole evidence against the men consisted of written and verbal admissions that they were said to have made during interviews by police. Having heard evidence, both from others alleging similar mistreatment and from the doctors who had examined the men, the trial judge was satisfied that neither man had been ill-treated and admitted their statements. The Northern Ireland Court of Appeal (NICA) quashed the convictions, about which it had a ‘distinct feeling of unease’,13 on the basis of evidence that had not been disclosed about the defence witnesses and interviewing officers, which may have altered the trial court’s conclusions regarding the applicants’ admissions. Despite a question from the judge, it had not been disclosed that an assistant director in the Department of the Director of Public Prosecutions had recom-
mended that the prosecution of a defence witness for one of the same murders as McCartney should not proceed, having concluded that a court would not accept that his admissions of murder and causing an explosion had been made voluntarily. The prosecutor also recommended that both interviewing officers should be prosecuted for assault. In addition, it was apparently not known at the trial that five months earlier, the NICA had quashed the conviction of a man arrested a month before the appellants, ruling his incrimi-
nating statements inadmissible on the basis that it was not possible to exclude the conclusion that he had been assaulted at the police station. Subsequent to McCartney and MacDermott’s trial, the man had brought a private prosecu-
tion against detectives within the team that investigated the relevant murders. MacDermott alleged that he had been assaulted by one of these officers and by a second detective who accompanied him; McCartney claimed to have been assaulted by the second detective. The judge in the private prosecution found that there was a strong prima facie case of assault, although the officers were acquitted.

In addition to the human rights organisation JUSTICE, Barry George was permitted to intervene in this case. His conviction for the murder of television presenter Jill Dando was overturned on the basis that new reports from the Forensic Science Service had shown that the findings presented at the trial about firearms discharge had no evidential value. A retrial was ordered at which this evidence was not admitted and he was found not guilty. The judicial review of the decision not to award him compensation had been stayed pending the outcome in Adams.

13 R v McCartney; R v MacDermott [2007] NICA 10 at [96].
THE SUPREME COURT DECISION IN ADAMS AND THE POSSIBLE MEANINGS OF ‘MISCARRIAGE OF JUSTICE’

The Justices undertook a lengthy review of the material relating to the drafting of Article 14(6) ICCPR, but they found sources extrinsic to domestic authorities of only limited assistance. They accepted Lord Bingham’s suggestion in Mullen\(^\text{14}\) that the phrase ‘miscarriage of justice’ may have commended itself to the state parties drafting Article 14(6) because of the latitude of interpretation that it offered. According to Lord Phillips, the travaux préparatoires clearly establish that the parties intended Article 14(6) to cover the situation where a newly discovered fact demonstrates conclusively that the appellant is innocent of the crime of which he had been convicted. The state parties were not, however, prepared to agree an interpretation which restricted the ambit of Article 14(6) to this situation.\(^\text{15}\)

Lord Phillips identified two objectives of section 133: the ‘clear’ primary purpose to provide entitlement to compensation to those convicted and punished for crimes they did not commit; and a subsidiary objective that compensation should not be paid to those convicted and punished for crimes they did commit. The difficulty in reconciling these objectives is that the quashing of a conviction does not necessarily prove that the successful appellant did not commit the crime. A conviction must be quashed if the appellate court doubts its safety.\(^\text{16}\) As the Court of Appeal explained in the case of the M25 Three:

> A conviction can never be safe if there is doubt about guilt. However, the converse is not true. A conviction may be unsafe even where there is no doubt about guilt but the trial process has been ‘vitiated by serious unfairness or significant legal misdirection.’\(^\text{17}\)

According to Lord Phillips, it is therefore

> . . . not satisfactory to make the mere quashing of a conviction the trigger for the payment of compensation . . . 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.\(^\text{18}\)

The Justices used the four categories identified by Dyson LJ in Adams’ appeal as the framework for their discussion.

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\(^\text{14} \) Mullen n 2 above at [9].
\(^\text{15} \) Adams n 5 above at [20]–[23].
\(^\text{17} \) R v Davis, Rowe and Johnson [2001] 1 Cr App R 8 at [56] per Mantell LJ.
\(^\text{18} \) Adams n 5 above at [37].
Category 1: Fresh evidence that shows clearly that the defendant is innocent of the crime of which he was convicted

For the Secretaries of State it was submitted that only cases falling within category 1 should satisfy the requirements of section 133(1). In Lord Phillips’ view, this is the definition that the ‘man in the street’ would be likely to approve; a case in which, for example, newly available DNA evidence entirely exculpates the individual. Whilst it would be hard to argue against such cases meriting compensation, the question was whether this should provide the exclusive definition of ‘miscarriage of justice’. There was some dispute between Lord Phillips and Lord Judge as to whether the Court of Appeal is entitled to state that an appellant is innocent; Lord Brown found it unnecessary to decide. The Supreme Court concluded in this respect that it is for the Secretary of State, not the Court of Appeal, to decide whether the requirements of section 133 are satisfied.

Lords Judge and Brown would have restricted compensation to category 1 cases because, on their reading of section 133(1), the specification that a miscarriage of justice be shown ‘beyond reasonable doubt’ requires that the scheme is confined to cases in which the truly innocent have been convicted of an offence (Lord Rodger and Lord Walker agreed). The majority demurred, as the category would then exclude those who no longer seem likely to be guilty, but whose innocence is not established beyond reasonable doubt. Moreover, state parties to Article 14(6) had rejected an amendment which would have limited its application to category 1 cases.

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

The category 2 test is more stringent than that applied by the Court of Appeal in determining the safety of a conviction, which asks only if the evidence, if given at the trial, might reasonably have affected the decision of the jury to convict. The fresh evidence may bear on the credibility of prosecution witnesses rather than directly on whether the defendant committed the crime. The defendant may not be factually innocent in these cases. It was reasoned that category 2 cases are more likely to arise in common law jurisdictions in which the judge screens from

19 ibid at [43] (Lord Phillips).
20 R (Adams) v Secretary of State for Justice n 11 above at [19] (Dyson LJ).
21 Adams n 5 above at [45].
22 ibid at [251].
23 Further to the comments made by Lloyd LJ in the successful appeal of the Birmingham Six (R v Mulkenny (1991) 93 Cr App R, 287 at [311]).
24 Adams n 5 above at [277].
25 ibid at [249] (Lord Judge); at [277], [280] (Lord Brown). See also Lord Brown’s discussion in the Divisional Court in R (Mullen) v Secretary of State for the Home Department [2002] EWCA 230 (Admin); [2002] 1 WLR 1857 at [24]–[26].
26 Adams n 5 above at [49]–[50] (Lord Phillips).
the jury evidence that may cause prejudice or an unfair trial. Lord Phillips suggested that, as the test is derived from Article 14(6), it would be preferable if it were one more readily applicable in other jurisdictions. Because of this, and because the Secretary of State’s task under the test would be difficult to fulfil, he replaced it with ‘a more robust test’ 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’. This is a matter to which the test of satisfaction beyond reasonable doubt can readily be applied (Lords Brown and Rodger disagreed). As innocence is not a concept known to this criminal justice system, which distinguishes between the guilty and the not guilty, Lady Hale found this approach to be more consistent with the ‘golden thread’ principle under which a person is only guilty if the state can prove it beyond reasonable doubt. According to Lord Kerr, the proper application of section 133 ties entitlement to compensation firmly to the true factual situation. He suggested his own category 2 criteria that a claimant for compensation would have to show that ‘on the facts as they now stand revealed, it can be concluded beyond reasonable doubt that the applicant should not have been convicted’, but he accepted Lord Phillips’ test which he thought would achieve the same results.

**Category 3: Fresh evidence rendering the conviction unsafe**

This category replicates the test applied by the Court of Appeal. It includes cases in which the fresh evidence reduces the strength of the case that led to the claimant’s conviction, but does not necessarily diminish it to the point where there is no longer a significant prosecution case. All of the Justices excluded these cases from the scope of section 133. Inclusion of the category would give no sensible meaning to the requirement that the miscarriage of justice be shown ‘beyond reasonable doubt’ and would not strike a fair balance between the two objectives of section 133.

**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**

This category would include a case such as *Mullen* which involved an abuse of process so egregious that the conviction had to be quashed, notwithstanding the

28 Such as under the Police and Criminal Evidence Act 1984, s 78. Lord Phillips also referred to the Northern Ireland (Emergency Provisions) Act 1978, s 8(2) as relevant to the admissibility of confessions in McCartney and MacDermott’s case, even though their trial was held without a jury.

29 *Adams* n 5 above at [54].

30 *ibid* at [55].

31 *ibid* at [280].

32 *ibid* at [116].

33 *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481 (Viscount Sankey LC).

34 *Adams* n 5 above at [178].

35 *ibid* at [40]–[41] (Lord Phillips).
factual guilt of the appellant (Mullen had been deported from Zimbabwe by British authorities in contravention of international and Zimbabwean law). Lord Phillips considered the category to have no bearing on what he identified as the primary purpose of section 133, the compensation of those who have been convicted of crimes which they did not commit, and thought it likely to defeat the subsidiary object of the provision by resulting in the payment of compensation to criminals whose guilt was not in doubt.³⁶ Again, the Justices were unanimous in finding that such cases were excluded from the scheme.

OTHER CONSIDERATIONS

Retrial

The Justices performed some linguistic gymnastics to incorporate the statutory mention of a retrial, an amendment to the statutory scheme added two decades later.³⁷ They concluded that it may become apparent only in the course of the retrial that the defendant is correct in asserting that the fresh evidence demonstrates that he or she is not guilty. They cautioned that this conclusion should not be taken as suggesting that compensation is payable in every case, such as that of George, where the retrial ends in acquittal; the tests laid down in section 133(1) must still be applied.³⁸

New or newly discovered fact

Many miscarriages of justice have resulted from non-disclosure of evidence by the prosecution.³⁹ In contrast, in Adams’ case, the material had been disclosed to the defence team; it just had not been viewed. The Supreme Court considered by whom the fact must be ‘newly discovered’. Lords Hope and Judge, representing a majority on this issue, preferred a narrow definition,⁴⁰ arguing that the focus of attention is on what was known or not known to the trial court, rather than the appellant. Yet only Lord Hope considered that the evidence in Adams’ case was not new or newly discovered.⁴¹ According to Lord Judge, material should not necessarily be excluded from the ambit of section 133 merely because the prosecution has complied with its disclosure obligations; instead, the approach should correspond with that of the Court of Appeal under section 23 of the Criminal Appeal Act 1968, that there should be a reasonable explanation for the earlier failure to adduce the evidence at the trial.⁴²

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³⁶ ibid at [38].
³⁷ See text accompanying n 10 above.
³⁸ Adams n 5 above at [104] (Lord Hope).
⁴⁰ Adams n 5 above at [107], [266].
⁴¹ ibid at [112].
⁴² ibid at [266].
For the minority, Lord Phillips would have adopted a ‘generous’ interpretation\(^{43}\) (agreed by Lady Hale and Lords Kerr and Clarke) that the fact should be newly discovered by the appellant. This interpretation incorporates those who ‘either did not know or did not appreciate the significance of the information in question’.\(^{44}\) Section 133(1) ends with the proviso ‘unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted’. It was noted that ‘[m]any 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.’\(^{45}\)

**Does denial of compensation infringe the presumption of innocence?**

One of the functions of Article 6(2) of the ECHR is to protect an acquitted person’s reputation from statements or acts that follow an acquittal which would seem to undermine it.\(^{46}\) The Court was referred to a series of European Court of Human Rights decisions which shows that the presumption of innocence may be violated when, following an acquittal, a court or other authority expresses an opinion of continuing suspicion which amounts in substance to a determination of guilt,\(^{47}\) an argument previously rejected by the UK domestic courts.\(^{48}\) Lord Phillips stated (somewhat oddly given the careful consideration of category 1, and the fact that the minority subscribed to this view) that ‘[o]n no view does that section [133] make the right to compensation conditional on proof of innocence by a claimant’.\(^{49}\) He reiterated that category 2 was the test, adding that

\[
\text{[w]hatever the precise meaning of ‘miscarriage of justice’ the issue in the individual case will be whether it was conclusively demonstrated by the new fact. The issue will not be whether or not the claimant was in fact innocent. The presumption of innocence will not be infringed.}\]

Whilst it is not open to the state to undermine the effect of the acquittal, Article 14(6) does not forbid comments on the underlying facts of the case in subsequent proceedings of a different kind, such as a civil claim of damages. The Article 14(6) scheme ‘does not cross the forbidden boundary’.\(^{51}\)

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\(^{43}\) Following the Irish Criminal Procedure Act 1993, s 9(6).

\(^{44}\) *Adams* n 5 above at [117] (Lady Hale).

\(^{45}\) ibid at [63].

\(^{46}\) See *Taliadorou and Stylianou v Cyprus* European Court of Human Rights, Application nos 39627/05 and 39631/05 (unreported) 16 October 2008 at [26].


\(^{48}\) *R(Allen) (formerly Harris) v Secretary of State for Justice* [2009] 2 All ER 1.

\(^{49}\) *Adams* n 5 above at [58].

\(^{50}\) ibid.

\(^{51}\) ibid at [111] (Lord Hope).
DISCUSSION

Miscarriages of justice have been a vexed issue for the courts and have been the subject of extensive academic consideration. The previous government acted in great haste to alter the compensation scheme by eliminating the *ex gratia* route in 2006. In *Adams* the Justices gave little attention to political or academic discussion of the issue. The judgment requires considerable engagement by the reader and seems likely to result in further test cases.

The role of ministers and application of the test

In *Adams* the Supreme Court emphasised that the section 133(1) test is for Secretaries of State to apply, but it made no comment on the appropriateness of this. The provision of compensation, particularly in high profile or very serious cases, can present political difficulties. It is perhaps surprising that the Court did not discuss issues related to the separation of powers as this is one of the few determinations relating to criminal proceedings to be left to a politician. The powers of the relevant Secretaries of State have been removed in the administration of life sentences, parole decisions, and the reference of convictions back to the Court of Appeal, due to concerns about the separation of powers and to comply with human rights obligations. Although determinations regarding compensation under section 133 are dealt with as civil matters not involving Article 6(1) ECHR, they nonetheless require adherence to common law principles such as legality and procedural propriety.

To apply the new test, the Secretary of State must consider whether a new or newly discovered fact has led to the quashing of the conviction and, if it has, must consider whether that fact shows beyond reasonable doubt that there has been a miscarriage of justice. Not only is the new test complicated for ministers to apply, it presents a high threshold for applicants to pass. Given the potential for


53 See n 9 above.


56 *Adams* is representative of this approach. In regard to decisions on assessment of compensation, see *Re Hegan’s Application* [2000] NI 461 (NIQB) (Kerr J).

differences of opinion, it will also be difficult for appellants to succeed on judicial review, for which the standard is presumably Wednesbury unreasonableness or irrationality.\textsuperscript{59}

An objective or subjective test

Whilst the Supreme Court acknowledged the difficulties of overlaps between categories 2 and 3, it failed to consider that a category 4 case such as Mullen could fit within category 2 and, equally, a less sympathetic decision maker could put cases such as McCartney’s and MacDermott’s into category 4. It seems possible that the categorisation may be determined by the Secretary of State’s assessment of the applicant’s guilt or innocence, even if that view is not stated explicitly.\textsuperscript{60}

A potentially significant difference arises between Lord Phillips’ category 2 ‘no conviction could possibly be based on’ and Lord Kerr’s suggestion that ‘the applicant should not have been convicted’.\textsuperscript{61} Lord Kerr accepted Lord Phillips’ version as it ‘appears to me to achieve the same result’, then repeated the new test but using his preferred ‘should’. Although he suggested the new test is objective,\textsuperscript{62} particularly in Northern Ireland cases it is by no means certain that the two tests would achieve the same result. The application of the test may be considered both in normative and historical terms. Determinations regarding compensation in conflict-related cases will often turn on whether the evidence against the defendant is evaluated by current standards or the heightened political context in which the trial occurred. Most convictions were achieved on the basis of exceptional procedures and ‘emergency provisions’ legislation which included extended periods of detention and the routine exclusion of solicitors from police interviews which were not tape-recorded.\textsuperscript{63} The emergency provisions were highly controversial but were considered lawful;\textsuperscript{64} derogations in relation to detention were entered to the ECHR and ICCPR, and found by the Strasbourg court not to be in violation of the ECHR.\textsuperscript{65} It may be argued that under the ‘contemporary

\textsuperscript{59} Associated Provincial Picture Houses v Wednesbury Corporation [1947] EWCA Civ 1; [1948] 1 KB 223. In Mullen the House of Lords reviewed the rationality of the Secretary of State’s decision not to compensate under the \textit{ex gratia} scheme, n 2 above at [12], [61]. An applicant might alternatively challenge a decision on common law grounds of equality and/or substantive fairness, albeit that this would require evidence of differential treatment between applicants. See G. Anthony, \textit{Judicial Review in Northern Ireland} (Oxford: Hart Publishing, 2008) at [6.29]–[6.30], [6.34]–[6.35] and \textit{Re Adams’ Application} NIQB (unreported) 7 June 2000 (Gillen J).

\textsuperscript{60} Adams n 5 above at [178].

\textsuperscript{61} ibid at [167], [178].

\textsuperscript{62} Preliminary Submission from CAJ to the Eminent Jurists Panel (Belfast: Committee on the Administration of Justice, April 2006) at http://ejp.icj.org/IMG/CAJbriefingEJP.pdf 8–9, 22–24 (last visited 31 January 2012).


\textsuperscript{64} Bannigan and McBride v United Kingdom (1994) 17 EHRR 539.
standards of fairness analysis used by the Court of Appeal when reviewing the safety of convictions, such convictions should not have been achieved. The distinction between Lord Kerr’s analysis of the facts and that of the NICA in McCartney’s and MacDermott’s cases (Lord Kerr concluded that they ought not to have been convicted or prosecuted, whereas the Lord Chief Justice of the NICA considered ‘it can only be said that the appellants might not have been convicted’ (emphasis in original)) makes clear that such convictions could well have been achieved, particularly in the context of the time at trial. It is thus difficult to predict – and will be difficult to challenge – the conclusions to which the Secretary of State might come in subsequent cases, of which there are likely to be a significant number.

Purpose and principle

The judgments suffer from a lack of analysis as to the purpose of compensation, which the legislative history does not clarify. Lord Phillips’ identification of the primary and secondary objectives of the provision was made without reference to any authority. It is by no means certain that Article 14(6) supports these aims, particularly if the deliberately ambiguous terminology was intended to encompass different countries’ conceptions of ‘miscarriage of justice’.

The focus on the guilt or otherwise of the appellant means that absent from the new test is any consideration of fault by the state. Convictions may be quashed when there has been no individual fault (for example, when a scientific technique has been discredited), when material was not disclosed (inadvertently or otherwise), or as a result of mistreatment of suspects, corruption, or abuse of process. The Justices have concluded that regardless, the ‘guilty’ should not be entitled to compensation. (No mention was made of section 133A(2), which provides that in determining compensation payments ‘the assessor shall have regard in particular to . . . (b) the conduct of the investigation and prosecution of the offence.’) Walker has argued that ‘a breach of “the principle of judicial legitimacy” should be of concern even if there is an accurate and fair determination of guilt or innocence’.

65 R v Bentley (deceased) [2001] 1 Cr App R 21.
66 Adams n 5 above at [168].
68 A number of convictions have already been quashed, the NICA is due to give judgment in four conjoined ‘juvenile confession’ cases referred by the CCRC, and several more cases are pending before the CCRC. (Annual Report and Accounts of the Criminal Cases Review Commission 1 April 2010–31 March 2011, HC 1225 14 July 2011 16.) Applications to the CCRC are likely to continue, given the publicity surrounding these cases and abusive interrogations of suspects. See, eg, I. Cobain, ‘Hundreds of Northern Ireland “terrorists” allege police torture’ The Guardian 11 October 2010.
69 See in particular the exchange between Lord Hutchinson and Earl Ferrers in HL Deb vol 499 cols 1631–1634 22 July 1988, indicating that it is for the courts to define ‘miscarriage of justice’.
international context, the United Nations Human Rights Committee considers compensation under Article 14(6) to provide an ‘effective remedy’ for wrongs done to victims of miscarriages of justice.\(^\text{71}\) More generally, effective remedies under international human rights law are owed to victims of abuses regardless of their guilt or innocence.\(^\text{72}\) In its exclusion of category 4 cases, the Supreme Court has ruled in effect that wrongdoing by the state, no matter how egregious, is trumped by the presumed guilt of the defendant. Such an approach accords with populist legislative notions about deserving and undeserving defendants\(^\text{73}\) and victims.\(^\text{74}\) The judgment is in keeping with other authorities in which the courts have declined to state that a successful appellant is innocent but have been rather less coy about insinuating that a successful appellant is factually guilty.\(^\text{75}\)

A related issue is that the content of Court of Appeal judgments will almost inevitably influence decisions by Secretaries of State under section 133.\(^\text{76}\) It is already a source of understandable distress for some successful appellants that the Court of Appeal will rarely assert innocence and that official apologies are even more uncommon.\(^\text{77}\) There are undoubtedly valid reasons for this, including the presumption of innocence being restored to all successful appellants.\(^\text{78}\) It would have posed an almost insurmountable challenge for appellants had the Supreme Court confined eligibility to category 1 cases. In addition, it has long been recognised that the Court of Appeal is more amenable to appeals based on legal argument (ie category 3 cases) than new facts (category 2)\(^\text{79}\) with obvious consequences for decisions under section 133. In Adams Baroness Hale referred to the importance of the ‘golden thread’\(^\text{80}\) but did not then explain how the new test supports that principle. Whilst none of the Justices contended that the correct interpretation of section 133 was the category 3 test, it

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\(^{72}\) See, for example, L. LaPlante, ‘Heeding Peru’s Lesson: Paying Reparations to Detainees of Anti-Terrorism Laws’ (2006) 2 Human Rights Law Commentary 88, 97 (discussing Casafranca v Peru CCPR/C/78/D/981/2001 (2003)).

\(^{73}\) See, for instance, cases relating to the right of silence provisions (Criminal Justice and Public Order Act 1994, ss 34–38) where ‘such inferences as appear proper’ may be drawn against defendants who do not cooperate with the police.

\(^{74}\) See the Criminal Injuries Compensation Scheme 2008, para 13(e) allowing awards of compensation to be withheld or limited when the victim has been convicted of a criminal offence.

\(^{75}\) See, for example, R v Davis, Rowe and Johnson [2001] 1 Cr App R 8 at [95] where it was recorded ‘for the better understanding of those who have listened to this judgment and of those who may report it hereafter this is not a finding of innocence, far from it’.

\(^{76}\) In Adams the Justices considered that Secretaries of State must ‘have regard to’ the terms of Court of Appeal judgments but may go beyond them. Adams n 5 above at [36] (Lord Phillips); [169]–[170] (Lord Kerr); [209] (Lord Clarke).

\(^{77}\) See for example, ‘Court clears Maguires but casts shadow on victory’ The Guardian 27 June 1991; ‘There was no apology’ The Scotsman 15 Nov 2002, reporting the successful appeal of Robert Brown 25 years after his conviction for murder; and former Prime Minister Tony Blair’s apology to the Guildford Four and Maguire Seven in The Times 10 February 2005.

\(^{78}\) See H. Quirk, n 52 above, 767–768.

\(^{79}\) The Royal Commission on Criminal Justice, Report Cm 2263 (1993) 162.

\(^{80}\) Adams n 5 above at [116].
would seem to be the test most easily reconciled with the presumption of innocence.\textsuperscript{81}

There has been a substantial drop in the number of applications approved since the abolition of the ex gratia scheme in 2006.\textsuperscript{82}

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<th>Total Applications Received</th>
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The concern in regard to \textit{Adams} is that the narrow eligibility test combined with the abovementioned limitations on conclusions made by appellate courts will maintain the significant restrictions in compensation under section 133 and preclude awards in cases of serious state abuse. The criteria to be considered by the Independent Assessor of Compensation allow for compensation awards to be reduced on the grounds of successful appellants’ contribution to their own misfortune, or in consideration of any other convictions.\textsuperscript{83} Whilst it is debatable whether this approach is compatible with a compensatory scheme (the Oxford English Dictionary defines compensation as ‘[t]hat which is given in recompense, an equivalent rendered, remuneration, amends’), it is more appropriate that such determinations are made by the assessor determining the amount of an award on clearly established grounds, rather than a similar assessment being used by courts to preclude eligibility altogether.

\textbf{CONCLUSION}

For a case intended to bring clarity to the definition of miscarriage of justice, this judgment is disappointing. Constrained by the legislative requirement that a new fact must establish beyond reasonable doubt that a miscarriage of justice has occurred, it was clearly outwith the scope of the Supreme Court to consider the full range of options for a compensation scheme. Even so, it is

\textsuperscript{81} The Court of Appeal in \textit{Mullen} had considered that the English presumption of innocence required compensation, \textit{R (Mullen) v Secretary of State for the Home Department} [2002] EWCA Civ 1882; [2003] 2 WLR 835 at [28]–[32], [42] (Schiemann LJ), a conclusion supported by academic opinion prior to the House of Lords’ judgment (S. Roberts, ‘“Unsafe” Convictions: Defining and Compensating Miscarriages of Justice’ (2003) 66 MLR 441, 450–451 and N. Taylor, ‘Compensating the Wrongfully Convicted’ (2003) 67 J Crim L 220, 230–232). See also Spencer, n 52 above, 821. Lord Bingham’s judgment in the House of Lords does not address whether some or all of those exonerated because of fair trial violations should be compensated. \textit{Mullen} n 2 above at [9].

\textsuperscript{82} \textit{Adams} n 5 above at [75].

\textsuperscript{83} Criminal Justice Act 1988, ss (3)(a) and (b) of s 133A. See also Ministry of Justice, ‘Compensation for Wrongful Conviction: Note for Successful Applicants’ 13 July 2011 paras 9–10 (document on file with authors).
surprising that the Court made no comment on the limitations of section 133 in regard to the circumstances in which compensation can be paid,\textsuperscript{84} the decision-making powers of politicians, or the demise of the \textit{ex gratia} scheme which provided a useful mechanism for cases which fell outside the narrow provisions of section 133. Whilst not as resolutely unsympathetic to appeals based on legal ‘technicalities’ as it might have been, it is unfortunate that the Court, in such a lengthy judgment, was not bolder and clearer in its examination of the underlying principles of compensation in the context of a system based on the presumption of innocence.

The Supreme Court’s dilemma may be reduced to the question ‘is it better that ten factually innocent people are denied compensation than to have one factually guilty person receive it?’\textsuperscript{85} Lord Phillips raised the competing objectives of compensating the innocent whilst not rewarding the guilty but gave little assistance as to how they should be balanced. The category 2 test, as with category 4, has no inherent connection with the guilt or innocence of the appellant. Some factually guilty \textit{may} gain compensation under category 2 and an unknowable number of the factually innocent are likely to be excluded from the scheme, unable to convince the Secretary of State that ‘no conviction could possibly be based’ on the evidence against them. This may be particularly problematic in Northern Ireland conflict-related cases and cases of historic sexual abuse. The details of the compensation scheme allow for the conduct of the appellant to be considered in the calculation of the assessment; \textit{Adams} invites such an analysis at the eligibility stage so that cases do not even reach the assessor.

The Court’s focus on the appellants’ position meant that it failed to incorporate into its reasoning what might be described as the other axis in this equation: the culpability of the state. Whilst Spencer has reasoned that, whatever the cause of the miscarriage of justice, the outcome is the same for the individual,\textsuperscript{85} we would argue that malpractice and misfeasance by the authorities are aggravating factors in a miscarriage of justice case, and also that state abuses require an adequate response in the form of compensation to victims. The fundamental principles behind compensation for miscarriages of justice can be conceived more broadly than on the basis of the victim status of the appellant\textsuperscript{86} but, at a minimum, redress for state misconduct could have been readily accommodated in section 133. The Court of Appeal has generally taken the view that convictions obtained by improper means should not be upheld. It is troubling that this judgment could be seen to suggest that wrongdoing by state agencies against ‘known criminals’ is less serious than against the innocent, an approach defined by Sir John Woodcock as ‘noble cause corruption’\textsuperscript{87} – which ultimately came to be recognised as a cause of miscarriages of justice.

\begin{itemize}
\item \textsuperscript{84} See, however, Lord Judge’s passing reference to this issue. \textit{Adams} n 5 above at [241].
\item \textsuperscript{85} n 52 above, 803–804, 817.
\item \textsuperscript{86} \textit{ibid}, 817, 819.
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